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# Decisions

## January 81

Concurrent  
Publications

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# ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1981] OLRB REP. JAN.**

Selected decisions of particular reference value are  
also reported in *Canadian Labour Relations  
Boards Reports*, Butterworth & Co., Toronto.







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**1170-80-U; 1172-80-U** The Amalgamated Transit Union, Local 1573, Complainant, v. **The Corporation of the City of Brampton (Brampton Transit)**, Respondent, The Amalgamated Transit Union, Local 1573, Applicant, v. The Corporation of the City of Brampton, C. H. Prentice and R. Gourley, Respondents.

**Consent to Prosecute – Section 79 – Strike – Employees engaging in legal strike by refusing voluntary overtime – Disciplinary letters issued – Whether disciplined for exercising rights under Act**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**APPEARANCES:** *L. C. Arnold and A. Monette for the complainant/applicant; R. J. Taylor, C. H. Prentice and R. Gourley for the respondents.*

#### **DECISION OF THE BOARD; January 27, 1981**

1. File No. 1170-80-U is a complaint under section 79 of *The Labour Relations Act* in which it is alleged that the Corporation of the City of Brampton (“the City”) has violated certain provisions of the Act. File No. 1172-80-U is an application for consent to institute a prosecution of the City and two officials in its transit department.

2. The Amalgamated Transit Union, Local 1573, (“the Union”) is the bargaining agent for all employees in the City’s transit department, with certain exceptions not here relevant. The City and the Union were parties to a collective agreement which expired on June 30, 1980. Following unsuccessful negotiations for a new collective agreement, as of August 2, 1980 the employees represented by the Union were in a legal position to strike and the City in a legal position to lock them out.

3. On August 10, 1980, the membership of the Union met and voted to impose a ban on certain overtime work. The City has traditionally scheduled overtime for transit drivers in two different ways. One is by building overtime work into a driver’s regular schedule. The Union’s ban did not cover this type of overtime. The second type of overtime is referred to as “voluntary overtime” and is work performed in addition to a driver’s regular schedule. Drivers have traditionally had the right to either accept or reject this type of overtime. It was this type of overtime which was encompassed by the Union’s ban.

4. A concerted withholding of overtime work by employees designed to limit an employer’s output (as opposed to an individual employee deciding for reasons of his own not to work overtime) has been held to be a strike within the definition of that term contained in section 1(1)(m) of the Act, which states:

“‘strike’ includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;” (emphasis added)

Where employees not in a legal position to strike have engaged, or threatened to engage, in a concerted refusal to work overtime designed to restrict or limit output, the Board has directed that they cease from doing so. See: *C & C Yachts Manufacturing Limited*, [1977] OLRB Rep. July 433, and the cases cited therein. Interestingly enough, some two years ago the employees in the City's transit department decided to impose a ban on voluntary overtime work at a time when they were not in a legal strike position. In response to their action, officials of the Union called a meeting of the employees and convinced them to put an end to the ban on the basis that it amounted to engaging in strike activity at a time when a strike was unlawful.

5. We are satisfied that the ban on voluntary overtime work was aimed at restricting or limiting the City's transit operations as a means of bringing pressure to bear on the City in the negotiation process and that as such it amounted to strike activity on the part of employees at a time when they were in a legal position to strike. At the hearing it was contended by the City that it was not aware that the ban on overtime was done in connection with any strike activity and in this regard reference was made to the lack of any written communication from the Union to the City to this effect, as well as to certain statements in the press attributed to Mr. Monette, the President of the Union, concerning how the Union was trying to avoid a strike. Although there was no written communication to the City with respect to the overtime ban, the evidence establishes that Mr. Monette, the President of the Union, orally advised Mr. Gourley, the City's transit maintenance supervisor and acting transit operations supervisor, that a ban on overtime was being imposed so as to speed up negotiations. Although Mr. Monette in his dealings with the press did indicate that the Union was trying to avoid a strike, it is clear from both his testimony and the newspaper articles themselves that in his comments to the press he used the term "strike" in the sense most understood by the public, namely as a total withdrawal of services. The City was unlikely to have been misled by Mr. Monette's comments to the press since the Brampton press also reported the fact that the Union had banned overtime work as a way of backing its negotiating demands. It should also be noted that at a negotiation meeting held on September 3, 1980, Mr. D. Black, a management consultant who was conducting negotiations on behalf of the City, characterized the Union's ban on overtime as a strike. In all of these circumstances, we are satisfied that not only were the employees engaging in strike action by refusing to perform voluntary overtime work, but that the City was aware that this was the case.

6. In coming to the above conclusion we have considered, but rejected, the contention of Mr. Prentice, the City's transit manager, that the City was not certain that a ban on voluntary overtime was in effect because some such overtime work continued to be performed. In fact, apart from two probationary employees, the only voluntary overtime worked after the ban went into effect involved overtime performed by drivers who had agreed to do the work prior to the overtime ban being decided on. With respect to the two probationary employees, the Union advised them not to refuse voluntary overtime assignments because of their probationary status. In cross-examination, Mr. Gourley admitted that because of the overtime ban, between August 10 and September 6, 1980 he asked only the two probationary employees to perform non-scheduled work and that on occasion the two probationers worked up to sixteen hours per day.

7. On or about September 3, 1980, the Union rejected a settlement offer put forward by the City, and the City in turn decided to take steps to ensure the efficient operation of its transit service. To this end, it began to assign supervisors to drive buses. In addition, Mr. Prentice directed Mr. Gourley to direct employees to perform what had heretofore been



regarded as voluntary overtime, and also to advise them that if they refused to perform the work they would be disciplined and might face dismissal.

8. On Saturday, September 6, 1980, Mr. Gourley contacted three drivers who were on their day off and directed them to report for work. The first employee he contacted was Mrs. C. Buchanan. In response to Mr. Gourley, Mrs. Buchanan indicated that because of the position taken by the Union with respect to overtime, and because she had made plans to attend a barbecue, she did not want to come into work. Mr. Gourley then indicated to her that if she did not go into work she would face discipline, possibly discharge. Mrs. Buchanan then replied that if she had to go in she had to go in. Following this exchange, Mrs. Buchanan telephoned Mr. Monette, the President of the Union, and advised him of what had occurred. Shortly thereafter, Mr. Monette phoned Mrs. Buchanan back and advised her that she was within her rights to refuse to go into work. Mrs. Buchanan then telephoned the City's dispatcher and indicated to her that she would not be in to work.

9. The next employee Mr. Gourley contacted was Mr. B. Taylor. When asked to report to work, Mr. Taylor flatly refused to do so, saying that he had made plans to go North. Mr. Taylor also made a comment to the effect that two years ago the employees could not ban overtime because they were not in a legal strike position, but that now they were in a legal strike position and could ban overtime. In giving his testimony, Mr. Taylor stated that his reason for not going into work was the ban on overtime and that his comment about going North was meant to indicate that he was free to do what he wanted. After his talk with Mr. Gourley, Mr. Taylor phoned Mr. Monette to advise him of what had happened, and then proceeded with his plans to go North.

10. The final person contacted by Mr. Gourley was Mr. Louis Almeida. When told to report to work, Mr. Almeida replied that he would not do so because he had other plans. Mr. Gourley then indicated that a refusal to work might lead to the imposition of discipline, possibly even dismissal, but Mr. Almeida still refused to go into work. Following his conversation with Mr. Gourley, Mr. Almeida telephoned Mr. Monette to advise him of what had happened. In testifying before the Board, Mr. Almeida stated that the real reason he refused to work overtime was because of the Union ban, although he did not tell this to Mr. Gourley.

11. Shortly after the phone calls to the employees referred to above, Mr. Monette, along with two other union officials, went to see Mr. Gourley. At the time, Mr. Monette indicated that the refusal of the three employees to come into work had been connected with the Union's ban on overtime and added that the Union would view any discipline of the three employees as a breach of *The Labour Relations Act*.

12. On September 8, 1980, the City issued each of the three employees with a letter of warning, stating that the employee had refused to perform a work assignment and adding that "your continued refusal to accept such lawful work assignment will result in more severe disciplinary action being taken against you which could include dismissal". Although this type of warning letter is perhaps the least severe form of discipline open to an employer, as part of an employee's employment record it might have a future prejudicial effect on the employee. At the hearing the Board was advised that subsequent to the events set out above the parties had entered into a memorandum of settlement with the expectation that it would result in the execution of a new collective agreement, but that the City had not removed the letters of warning issued to the three employees from its personnel files.

13. It is the contention of the Union that the issuance of the letters of discipline amounted to the disciplining of employees for engaging in a lawful strike, and as such was contrary to sections 3, 58 and 61 of the Act. For its part, the City maintains that its only intent was to maintain a proper level of service in its transit department, and that its actions were not motivated by any event to interfere with the employees' right to strike.

14. In cross-examination, Mr. Gourley stated that he was aware that the real reason the employees did not go into work was the ban on overtime. Any doubts Mr. Gourley might have had in this regard would have been cleared up when Mr. Monette and other Union officials met with him later that day and indicated that the actions of the employees had been connected with the Union's ban on voluntary overtime. Accordingly, through Mr. Gourley, the City was aware that the action of the employees was part of a concerted refusal to work overtime which amounted to a strike under the Act at a time when such a strike was lawful.

15. The Supreme Court of Canada in *Canadian Pacific Railways v. Zambri*, 62 CLLC ¶15, 407 determined that participation in a lawful strike is a right of employees under *The Labour Relations Act*. Cartwright, J. (with Kerwin, C.J.C. Taschereau and Fateaux, J.J. concurring) expressed this principle as follows at pp. 455-456:

"It is said that the Act does not in terms declare the right to strike, but I find myself in agreement with Mr. Lewis' argument that the right is conferred by s. 3 which reads:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

It is clear on the findings of fact made by the learned Magistrate that the strike with which we are concerned was an activity of the union; I have already expressed my opinion that it was lawful; it follows that s. 3 confers upon the six employees, all of whom are members of the union, the right to participate in that lawful activity. I conclude therefore that the participation in the strike by the employees was the exercise of a right under the Act."

Judson, J. (with Abbot, Martland and Ritchie, J. J. concurring) reached a similar conclusion by reference to what was then section 54(2) of the Act, a section which is similar to the current section 63(2) in that it set out the conditions which must be met before employees would be in a legal position to strike, p. 456:

"The issue in the present appeal is a simple one. The collective agreement between the company and the union had expired. Every procedure required by the Act had been resorted to and every time limit had passed. The case is within s. 54(2)..."

This subsection limits the right to strike until its requirements have been complied with. But once the statutory requirements have been complied with, the strike becomes lawful under the Act. The foundation of the right to strike is in the Act itself."

It follows from the reasoning in the *Zambri* case, *supra*, that by refusing in concert to work overtime, and thereby engaging in a lawful strike, the three employees were engaging in a right under *The Labour Relations Act*.

16. Sections 58(a) and (c) of the Act provide as follows:

“58. No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

...

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.”

17. As already indicated, when the three employees refused to perform overtime work on Saturday, September 6, 1980, they were engaging in a lawful strike which was their right under *The Labour Relations Act*. The City, by issuing disciplinary letters against the employees, was in effect disciplining them for exercising a legal right. In our view, this amounted to a form of discrimination against the employees prohibited by section 58(a). Further, since the issuance of the disciplinary letters was clearly designed to deter the employees from similar conduct in the future, and keeping in mind that the letters warned that more severe disciplinary action, which could include dismissal, would be forthcoming if the employees again refused a work assignment, we are satisfied that the City’s action involved both the imposition of penalty, and the use of a threat, to compel the employees to refrain from exercising a right under the Act contrary to section 58(c).

18. It perhaps bears repeating that our conclusion follows from the definition of the term “strike” set out in the Act. In most instances, the definition acts in management’s interests in that employees cannot during the term of a collective agreement act in concert to refuse voluntary overtime as a means of restricting or limiting output. Indeed, as noted above, in the one previous instance where the City’s transit drivers did impose a ban on overtime, it was the Union which stepped in and convinced the employees to cease their conduct as being unlawful. However, the other side to the definition is that it makes a concerted refusal to work overtime a right of employees when they are in a legal strike position. Such action may well result in disruptions to an employer’s operations and a corresponding increase in the union’s bargaining power, but that is the scheme envisaged by the Act. An employer, for its part, is free to take measures designed to limit the disruptive effect of this type of strike activity, such as the increased use of managerial personnel and non-striking employees. An employer is also free to



take responsive action through its right to lock out employees. An employer is not, however, free to discipline or punish employees for engaging in a lawful strike.

19. Having regard to our conclusion set out above, the City is directed to remove from its personnel files the letters of warning issued on September 8, 1980 to Mrs. Buchanan, Mr. Taylor and Mr. Almeida.

20. In all the circumstances, we are of the view that no valid industrial relations purpose is likely to be served by prolonging this matter through the prosecution of either the City or its officials. Accordingly, the application for consent to institute a prosecution is denied.

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**0784-80-R Local 966, Amalgamated Transit Union, Applicant, v. The Corporation of the City of Thunder Bay, Respondent, v. Group of Employees, Objectors**

**Bargaining Unit – Certification – Whether foreman, controllers and inspectors exercising managerial functions**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

***APPEARANCES:** Arthur H. Burke and Stuart E. Breiland for the applicant; Gae Hutchinson, Herbert B. Holmes and Ken McLean for the respondent; No one appearing for the objectors.*

**DECISION OF VICE-CHAIRMAN, E. NORRIS DAVIS, AND BOARD MEMBER J. WILSON; January 26, 1981**

1. The applicant which has represented the respondent's transit employees for many years now seeks to represent a new bargaining unit to be comprised of controllers, inspectors and a garage foreman. The respondent contends that all such persons are either exercising managerial functions or are employed in a confidential capacity in matters affecting labour relations within the meaning of section 1(3)(b) of the Act.

2. Section 1(3)(b) of the Act reads:

“(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

...

(b) who, in the opinion of the Board, exercises managerial functions...”

The purpose of denying access to collective bargaining of persons found to be managerial is “to ensure that the employee bargaining agent is independent of employer influence, and that

the interests of the employer will be represented by persons whose loyalties are undivided". See the case of *Transit Windsor*, [1979] OLRB Rep. March 262. The question as to whether there is an "exercise of management functions" must turn on the total factual situation existing in the individual case and is dependent on the degree of effective direction and control over other employees which is exercised.

3. In respect to Richard Stuart, Garage Foreman, who has been in his present capacity since February 4, 1980, he is responsible for the supervision of 35 mechanics to whom he makes daily work assignment, distributes overtime, fixes vacation schedules, keeps attendance records, attends meetings on behalf of the Maintenance Superintendent at which there are management and union representatives and grants leaves of absence for one to two days. He is involved in the hiring procedure through interviewing of applicants and making recommendations to the Superintendent and making periodic evaluations of probationary employees. He is aware that he has authority to reprimand employees and to discharge employees although neither authority has been exercised. He is not permitted to perform work of the type performed by employees he supervises. In our view, Stuart occupies a typical foreman position requiring him to exercise managerial functions within the meaning of section 1(3)(b) of the Act and accordingly is not to be considered as an employee for the purposes of the legislation.

4. There are four persons employed as controllers, reporting to the supervisor, and the parties agreed that the evidence given by Richard Oldale before the Examining Officer in respect to duties and responsibilities should stand for all controllers. The controller's function is concerned primarily with posting of daily route schedules with driver assignments for the succeeding day. Routes and crews are, in the main, pre-selected in accordance with established practice but require adjustment to compensate for illness, book-offs and off duty situations. These adjustments generally follow a defined pattern including the re-assignment of regular drivers, calling in of spare-board drivers or authorizing overtime. Drivers, on reporting for work, check it with the controller who also keeps attendance records. If a driver reports for work and is not in a proper condition to operate, the controller has authority to send him home, replace him and then report the matter to the supervisor. Controllers remain in touch with drivers on the route throughout the day (some 20 – 30 per cent of the units have radios and with inspectors who are in the field to ensure schedules are being met and the operation running according to plan. In an emergency, the controller has authority to dispatch another driver to a route or the dispatch another vehicle, or to take an operator off an assigned run and reassign him to another.

5. One of the controllers' job duties is to enforce transit policies and procedures. Controllers have the authority to send a driver home pending a review by the supervisor and can recommend reprimands and discharge. In respect to granting time off, this is restricted to absences of 1 – 2 hours and requests are otherwise referred to the supervisor. Oldale regularly sits on a Committee with two managerial persons to interview prospective employees and "to pick out the people we feel should be hired". Other controllers similarly act in this capacity although not as regularly as Oldale. Meetings are held regularly comprised of controllers and inspectors and the supervisory to discuss work problems and policy. At one meeting held in September, 1980 discussion also centered on collective bargaining negotiating objectives and the group was canvassed for recommended contract changes. Oldale states that he has been asked on previous occasions for recommendations regarding collective agreement changes but couldn't recall if it had been in a meeting.

6. There are inspectors also reporting to a supervisor and it was agreed that the

testimony of Brampton Boyd given before the Examining Officer should stand in respect to the duties and responsibilities of all inspectors. Inspectors are basically employed out in the field inspecting operators to ensure they are properly dressed and abiding by established rules, that buses are on schedule and properly maintained. The inspector drives a car in connection with his duties. Inspectors daily relieve controllers for lunch, and on week-ends relieve controllers for day off: during these periods the inspector performs all the duties normally done by a controller.

7. Inspectors' disciplinary powers are to issue verbal reprimands for breaches of rules (written warnings are issued by the supervisor) which are recorded in the inspector's daily report to the supervisor. They are empowered to send drivers home for breaches and the final action to be taken is determined by the supervisor. In one case, the inspector filed a report on a driver who used insubordinate language and this was followed by a meeting held by the Operations Supervisor at which the inspector, the driver and a union representative were present and resulted in the dismissal of the driver. In another case, the inspector had many times recommended the removal of an employee as a driver because of drinking, and after discussions between the inspector and the Operations Supervisor, the driver was dismissed. The inspector makes a daily written report to the supervisor which records all significant matters including any disciplinary action taken. The inspector cannot grant time off (except when acting as a controller) but refers the matter to the controller, but has granted time off in lieu of pay in respect to overtime. Inspectors have the same participation in meetings as is noted above in respect to controllers.

8. It seems obvious to us that the group of some 114 drivers here involved require some first line supervision, and that all of the regular day-to-day direction of the work force is provided by the controllers and inspectors. While much of the work of the controllers is hedged about by standard practices, they nonetheless do have to exercise a discretion in the implementation and to make decisions amounting to effective control over the work force in the enforcement of transit policies and procedures. While their disciplinary authority is slight, they are nonetheless in a position where they are required to monitor employee performance and to initiate action which may affect employees' economic interests. Additionally, they effectively participate in the hiring decision. Based on all the evidence, the Board concludes that controllers are persons who exercise managerial functions within the meaning of section 1(3)(b) of the Act.

9. As to the inspectors, we must conclude that they are engaged primarily in the effective direction and control of the work force. They have effective disciplinary authority up to and including the recommendation of dismissal, and their responsibility to enforce rules and performance bring them into direct conflict of interest with the employees who they supervise. For all of these reasons, we find that inspectors are persons who exercise managerial functions within section 1(3)(b) of the Act.

10. As a consequence of the above determinations, all of the persons claimed by the applicant to constitute an appropriate bargaining unit have been excluded from employee status. The application is accordingly dismissed.

#### **DECISION OF BOARD MEMBER H. KOBRYN;**

1. This is an application for certification. The applicant seeks to represent a



bargaining unit consisting of all inspectors, controllers, dispatchers and garage foremen employed by the respondent in the Transit Department.

2. The respondent stated that the persons employed in these named categories exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*.

3. A Labour Relations Officer made a report to the Board on 7 inspectors, 4 controllers and 1 foreman mechanic on the 5th day of November, 1980.

4. The Board held a hearing on this case on Tuesday, January 6, 1981 on the request of the respondent, with the following results.

5. From the evidence presented I cannot argue that the 4 controllers and the 1 foreman mechanic do not come within the meaning of section 1(3)(b) of *The Labour Relations Act*.

6. The situation of the inspectors is somewhat different from that of the controllers. While the degree of independent managerial authority of controllers is limited, that of the inspectors is virtually non-existent. Their function is to see that the buses are on time, the drivers are dressed properly, that they are not smoking and breaking the laws and this is performed by visual inspection. If a driver is found intoxicated, they have the authority to send him home for the shift, but if for any longer period it would be up to the supervisor. If improperly dressed they can give verbal warning, but a written reprimand is up to the supervisor. The inspectors are not involved with the attendance of drivers, as this is done by the supervisors.

7. Once a week, inspectors relieve the controller, this is done in rotation and each of their turn comes up every three weeks. On Saturdays and holidays drivers are called in to relieve the controllers. While acting as controller, the inspectors have authority to reprimand operators verbally. Some of the reasons to reprimand them would be, dress for one thing and smoking another. The inspectors assign operators to jobs only when acting as controllers. They are never involved in grievance procedure under the collective agreement nor do they attend any meetings of management dealing with labour relations. They have nothing to with the drawing up of schedules, this is done by the controllers.

8. Other jobs that are performed by the inspectors are, running errands for management, such as delivering passes to different outlets and errands to City Hall; delivering letters and picking up mail; putting up bus stop signs and writing a daily report to the supervisor on activities which take place. They only grant time off to employees when working as an acting controller.

9. A sample of the inspectors' lack of authority is demonstrated in the Labour Relations Officer's Report at page 54 in the examination of an inspector by the respondent:

"Did you recommend that Mr. Swinson be terminated?

No, I did not.

Did you have anything at all to do with the termination of Mr. Swinson?

Well, I reported him many times.

...

Did you recommend discipline for Mr. Swinson?

Well, I recommended that he should be taken off the bus. He shouldn't be driving. Many times.

Do you recall that Mr. Swinson was terminated?

Yes.

And it was in your opinion, due to many of the complaints that you raised about his performance or his behaviour?

Well, I imagine that would have entered into it."

On a question by the Officer in regards to what Mr. Swinson's problem was, the following remarks were made at page 57 of the Labour Relations Officer's report.

'What type of problems?

Drinking.

Drinking on the Job?

Right.

...

And after you had made your report was there an investigation by anyone other than yourself do you know?

Well the Supervisor took it from there.

Did the Supervisor ever speak to you about the problem?

Yes.

...

And I presume at that point you advised him that you had spoken to the employee a number of times about his drinking?

That's right and anytime I spoke to him it went in on the daily report that day."

The above exchange of questions and answers requires no further comment on the authority the inspector has to discipline employees.

10. With reference to the argument that the inspectors work as acting controllers and do perform managerial functions at that time, I will refer to the comments the respondent's counsel mentioned in *Sack and Levinson – Ontario Labour Relations Board Practices* at page 30:

“... It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e. to perform work properly performed by persons within the bargaining unit.) If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and *such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees*, the persons cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or *to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity.*”  
(emphasis added)

The above underlined last quotation also applies in reverse and is applicable to this case.

11. Counsel for the respondent presented to the Board a copy of the decision in *Transit Windsor*, [1979] OLRB Rep. March 262.

12. This was an application under section 95 of *The Labour Relations Act*. The applicant employer sought a determination whether, in the opinion of the Board, the employees occupying the positions of “inspector, dispatcher and garage foreman” exercised managerial functions within the meaning of section 1(3)(b) of the Act.

13. I have read this decision of the Board most carefully and a similar situation exists, except that in this case, the “controllers (dispatchers)” and “garage foreman”, in my opinion, exercise managerial functions within the meaning of section 1(3)(b) of the Act and the “inspectors” do not conform to the Board's decision at paragraph 10 in *Transit Windsor*, *supra*, wherein the Board stated as follows:

“The situation of dispatchers is somewhat different from that of inspectors. While the degree of independent managerial authority of inspectors is limited, that of the dispatchers is virtually non-existent. Their function is to apply pre-arranged schedules and rules in order to make sure that the drivers, buses, routes and schedules are all properly



'married', and that the required paper work is completed. The assignment of drivers – even in abnormal situations – is done in accordance with a pre-established scheme. Dispatchers receive, and record, various kinds of information and act as a conduit to management; however, these in themselves are not managerial functions. This documentation may well be an important input into the decision making process, but it is evident that the decisions are made by others. The dispatchers juggle the schedules to accommodate unplanned absences or 'emergency' situations but requests for time off are generally made to management. In contrast to the inspectors, neither of the dispatchers who gave evidence considered that he had a role in 'disciplining' fellow employees. Neither had sent anyone home as a disciplinary measure (although an employee who for one reason or another is not immediately available at the start of his shift may find that a dispatcher has designated another employee to perform his 'run' – though even here the selection is from an established list.) The dispatchers do not write 'tickets' or 'citations' as the inspectors do. Having carefully reviewed all of the evidence, the Board is satisfied that dispatchers do not exercise managerial functions."

14. In all the circumstances, therefore, in my opinion, the controllers and the garage foreman exercise managerial functions within the meaning of section 1(3)(b) of the Act. The inspectors do not exercise managerial functions and are employees within the meaning of the Act.

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## **1265-80-R Canadian Union of Public Employees, Applicant, v. The Corporation of the Township of Schreiber, Respondent**

**Bargaining Unit – Certification – Practice and Procedure – History of several part-time employees – Only one part-time employee on application date – Board excluding part-time employees from full-time unit**

**BEFORE:** R.O. MacDowell, Vice-Chairman, and Board Members E.J. Brady and H. Simon.

**DECISION OF THE BOARD;** January 15, 1981

1. This is an application for certification. When the matter came on for a hearing before the Board, the respondent indicated that there was only one part-time employee employed on the date of application; but that the respondent had a history of hiring other part-time employees at various times throughout the year. This fact was not disputed. By a decision dated November 14, 1980, the Board appointed a Board officer to inquire, inter alia, into the community of interest, if any, which the single part-time employee then employed by the respondent might have with the other employees in the bargaining unit.

2. Following the Board's initial decision, we have had the opportunity of reviewing the Board's long standing practice of granting a separate bargaining unit for part-time employees wherever there are part-time employees employed on the date of application or there is a history of part-time employment. The rationale for this position has recently been thoroughly

reviewed in *Toronto Airport Hilton* [1980] OLRB Rep. Sept. 1330; and reaffirmed in *Board of Education for the Borough of Scarborough* [1980] OLRB Rep Dec. 1713. We have also considered a number of other decisions of the Board respecting part-time employees including: *Tip Top Tailors* [1979] OLRB Rep. July 726, *Essex County Humane Society* [1969] OLRB Rep. June 391, *Post Printing Company Limited* [1966] OLRB Rep. March 930, and *Dominion Steel Export Company Limited* [1979] OLRB Rep. Oct. 953.

3. We have carefully considered the applicant's submissions, as well as the established Board practices with respect to part-time employees enunciated in the cases to which we have referred. In the present case, it is undisputed that the respondent has a history of hiring part-time employees; moreover, this is not a case in which this history is confined to employing only one part-time employee so that the result of excluding him now, would be to deprive him of all access to collective bargaining. Accordingly, the Board sees no reason in the instant case why it should depart from its usual practice of excluding part-time employees from the bargaining unit. We are satisfied that the ultimate bargaining unit description should contain the usual exclusion of persons regularly employed for not more than twenty-four hours per week. Consequently, it will be unnecessary for the labour relations officer to inquire into the community of interest of the part-time employee who was employed on the application date, and the scope of the officer's inquiry set out in the Board's decision of November 14, 1980, is hereby varied to that extent.

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## **1224-80-U Ontario Public Service Employees Union, Complainant, v. Cybermedix Limited, Respondent.**

**Charges – Duty to Bargain in Good Faith-Section 79 – Parties signing memorandum of agreement including recognition clause – Employer acquiring new business after agreement entered into – Demanding exclusion of newly acquired business from recognition clause as condition of ratification – Whether employer attempting to contract out of related employer provisions of Act – Whether recognition clause issue may be bargained to impasse – Whether employer change in bargaining posture bad faith bargaining**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members H.J.F. Ade and C.A. Ballentine.

**APPEARANCES:** *C.G. Paliare, F. Taylor and L. Rothstein for the complainant; E.L. Stringer, Q.C., D.L. Brisbin and V. Belleville for the respondent.*

### **DECISION OF THE BOARD; January 13, 1981**

1. This is a complaint under section 79 of *The Labour Relations Act* alleging that the respondent has contravened section 14 of the Act. The relevant portion of section 14 reads as follows:

14. The parties shall meet...and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

The case was argued on the basis of an agreed statement of fact.

2. The respondent company operates a number of medical testing laboratories from seventeen locations in Metropolitan Toronto, and employs approximately one hundred and twenty employees. On July 15, 1979, the complainant union applied to be certified as the bargaining agent for these employees. One of the matters in dispute during the certification proceedings was the description of the unit of employees appropriate for collective bargaining. The respondent took the position that there should be either seventeen, six or two separate bargaining units. The union sought a single comprehensive bargaining unit covering all of the respondent's employees and locations. The Board accepted the union's position and, in a decision dated August 7, 1979, certified the applicant as the bargaining agent for "all employees of Cybermedix Ltd. in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical employees and persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period."

3. By letter dated September 13, 1979, the trade union gave the employer notice to bargain, and thereafter, the parties met on a number of occasions in an attempt to effect a collective agreement. At the first or second meeting, the parties settled upon a recognition clause which closely paralleled the description of the bargaining unit certified by the Board. There were six bargaining meetings prior to the appointment of a conciliation officer in early April 1980.

4. By July 15, 1980, there were only two items remaining in dispute: union security; and the way in which employees would be placed on a salary grid which had already been agreed upon. The former issue was resolved by the passage of Bill 89 amending section 36a of *The Labour Relations Act*. The second issue was resolved when the union agreed to the respondent's position. Since, there were no longer any outstanding differences between the parties, they signed the following memorandum of agreement:

"This memorandum of agreement entered into this 15th day of July 1980

between

Cybermedix Limited hereinafter referred to as "Employer"

— and —

Ontario Public Service Employees Union and its Local 544 hereinafter referred to as "Union"

*The Employer and the Union, by the signature of their representatives below, agree that they shall recommend the terms of this memorandum to their respective principals. Upon acceptance of this memorandum, each party shall notify the other and such ratification, either written or verbal, shall constitute acceptance. Until a formal document can be drafted and executed as a collective agreement, this memorandum, including all matters already agreed shall constitute the collective agreement.*



1. All matters previously agreed to between the parties shall be included in the agreement.
2. Union security clause shall be based on the Union's proposal subject to deleting "new" in 401.
3. Salary grid placement shall, for 1980, be based on service as of January 1, 1980; effective 1981 placement shall be based on anniversary date.

Dated at Toronto this 15th day of July 1980

Cybermedix Limited                      OPSEU and Local"

(emphasis added)

5. The memorandum of agreement was signed by a senior official of the company, and it is difficult to see why any further ratification by its "principals" should be necessary; however, the language of the document is specific in this regard and its import is clear. Acceptance of the bargain would only occur when each of the parties notified the other that their respective principals were content with the settlement. In the absence of mutual ratification, there would be no binding agreement, and until ratification took place, the agreement would only be a tentative one. Moreover, by making it so, both parties are recognizing that one or the other may refuse to ratify, and further bargaining may be necessary.

6. There is no allegation of bad faith bargaining in respect of any of the negotiations prior to July 15, nor is there any allegation of any other unfair labour practice during or after the union's successful organizing campaign. The sole basis of the union's complaint is the respondent's repudiation of the July 15th memorandum of agreement.

7. Unknown to the union, the respondent had been attempting for some time to acquire control of S & M Laboratories Ltd., a company in the same business as the respondent, having approximately fifteen locations and eighty employees. Other firms were also seeking to purchase S & M and for this reason the respondent endeavored to keep its activities secret. Ultimately, the respondent was successful, and an agreement to purchase the shares of S & M was signed on July 5, 1980 – that is, ten days *before* the memorandum of agreement with the trade union. It should be noted however, that this share purchase agreement contained a number of conditions which had to be satisfied before it could become legally enforceable. Those conditions were not satisfied until the end of the business day on Friday August 1st, 1980.

8. On August 5th, 1980, Mr. L. Delauney-Belleville, general manager, of the respondent telephoned the union to advise that he was revoking the memorandum which he had signed unless the recognition clause of the proposed collective agreement was amended to make it clear that none of the terms of the agreement would apply to the employees of S & M. There followed an exchange of correspondence between the parties and on August 7, Mr. Delauney-Belleville wrote:

"This letter will confirm our telephone discussion during which I advised

you that this letter has been sent to you. We have been advised by our solicitors that you spoke to Mrs. Crowe at Stringer and Brisbin and advised her that you did not wish any mention of S & M Laboratories Limited in the exclusion clause of the collective agreement. It is our position that this matter must be specifically dealt with in order to avoid confusion and dispute in the future, therefore this company does hereby revoke the memorandum of agreement between us until we have satisfactorily resolved the issue and concluded a new memorandum of agreement or an amendment to the previous memorandum of agreement. We will be pleased to meet with you as soon as a date can be arranged which is mutually agreeable to us, the union and Mr. Brisbin."

On September 5, 1980, he reiterated his position:

"Please be advised that the Company has reviewed the issue outstanding between the parties. It is still the position of the Company, as stated in my letter to you dated August 7, 1980 that, to avoid future confusion and uncertainty, employees of S & M Laboratories Limited ought specifically to be excluded from the Recognition Clause, and particularly Article I, of the Collective Agreement."

9. Except for the issue of the recognition clause (which at present mirrors the description of the bargaining unit certified by the Board) there is no other issue remaining in dispute between the parties. The respondent's position (as indicated in its letters, and repeated to the Board) is that it is entitled to demand a clause ensuring that the settlement will not apply to S & M, and further that it is entitled to refuse to enter into the agreement which the parties had previously negotiated until this demand is met. The company is prepared to adhere to the settlement which was negotiated with respect to its own employees; but it will only do so if it is made clear that the bargain will never extend to the employees of S & M. There is no evidence that the parties have ever met to discuss the ramifications of the acquisition of S & M, although the union made it clear at the hearing that it was not prepared to accede to the respondent's request to alter the recognition clause of the proposed agreement.

10. On October 29, 1980, (i.e. about one week *after* the hearing in this matter) the union applied to the Board for a declaration (*inter alia*) that the respondent and S & M are "one employer" pursuant to section 1(4) of the Act. If the union is successful in its application it will "acquire" bargaining rights for the employees of S & M; and if there is a collective agreement in existence at the time of the declaration, there is a strong argument that it will apply automatically to the employees of S & M. It is evident therefore, that the concern expressed by the respondent is not an academic one, for unless the agreement expressly addresses the situation of S & M, that firm's employees may automatically acquire all of the rights and obligations of "employees" under the agreement. However, there was no evidence before the Board from which we can assess the potential impact if at some time in the future the collective agreement with the complainant is extended to the employees of S & M.

11. In the absence of any evidence to the contrary, we are prepared to accept the respondent's assertion that the actual acquisition of S & M did not become a certainty until August 1, 1980, two weeks after it had signed the memorandum of agreement with the union. We also accept its submission that the dynamics of the share purchase transaction and the existence of

other bidders made it imprudent to reveal its plans until they had crystalized. Finally, we are satisfied that the respondent is not trying to avoid entering into *any* agreement with the complainant; rather, it is attempting to ensure that the scope of the bargain will never extend beyond the original employee group which the union was certified to represent.

12. The union contends that the memorandum of agreement signed by the parties constitutes a binding collective agreement and urges the Board to infer the fact of ratification from the respondent's silence from July 15th to August 5th. We cannot accept this contention. The agreement is clear on its face, and is expressly made subject to ratification by *both* parties. If the union membership had failed to ratify the settlement there would be no binding agreement between the parties. The respondent's failure to ratify has the same effect. The respondent has not ratified the July 15th settlement. We are satisfied that there is no collective agreement now in existence.

13. The union argues in the alternative, that if there is no agreement now in operation, the respondent is precluded from "reneging" or repudiating the settlement reached on July 15th. While the union acknowledges that the company may have had legitimate business reasons for preserving the secrecy of its share purchase plan, it contends that if a change in business circumstances was contemplated, the company should not have, apparently unreservedly, entered into the July 15th memorandum of agreement. Furthermore, the agreement cannot apply to S & M as the situation now stands, for S & M is a separate legal entity and employer. Thus, argues the union, the respondent's demand is either academic, an attempt to vary the bargaining unit certified by the Board, or an attempt to avoid the future application of section 1(4) of the Act. The union contends that whichever way one characterizes the respondent's conduct, it constitutes bargaining in bad faith.

14. Before turning to the merits of the parties' respective positions, it may be appropriate to refer briefly to the legal parameters within which their rights must be determined. This is not the first time that an attempt has been made to alter a recognition clause in an agreement, nor is it the first time that a party has been accused of "reneging" on a settlement. Some guidance in respect of these matters can be gleaned from the Board's decided cases and the structure of the Act itself.

15. Firstly, it is clear that S & M was not a party to the certification proceeding, and is not covered by the certificate establishing the union's bargaining rights. The union has no right to represent the employees of S & M, and would itself be bargaining in bad faith if it sought to negotiate on behalf of S & M's employees, or apply economic pressure to force an extension of the agreement beyond the scope of the Board certificate. The union could approach S & M for voluntary recognition, but, if rebuffed, it must resort to the mechanisms for establishing bargaining rights prescribed by *The Labour Relations Act*. Until it does so, its rights are circumscribed by the existing certificate, and it has no right to recognition for any greater bargaining unit. Similarly, the respondent cannot insist upon bargaining terms and conditions of employment for the employees of S & M. S & M remains a separate legal entity and employer, unless the Board otherwise declares.

16. The question of recognition or an extension of recognition is a permissible subject for negotiations between a trade union and employer, and frequently, an expansion of an employer's operation will be dealt with by an agreed extension of the union's bargaining rights to the new operation and its employees. However, while the issue can be raised and discussed,



it cannot be pressed to an impasse, or become the focus of a test of economic strength. Unless the parties agree to a voluntary extension of bargaining rights (in effect, a voluntary recognition in respect of part of a bargaining unit), they must negotiate on the basis of the established bargaining structure. Neither of them can precipitate a strike or lock-out to change it. In *United Brotherhood of Carpenters and Joiners of America* [1978] OLRB Rep. Aug. 776, for example, a trade union with bargaining rights in certain geographic areas engaged in a strike to force an employers' organization to recognize it in geographic areas for which the union had no bargaining rights. The employers' organization contended that this attempt to use economic pressure to force and extension of bargaining rights was inconsistent with the scheme of Act and bargaining in bad faith. At paragraphs 11 and 18, the Board commented;

"11. The question squarely before the Board in this case is whether the respondent in insisting upon the extension of bargaining rights was pursuing a demand inconsistent with the scheme of *The Labour Relations Act* and, therefore, illegal. If the demand can be characterized as being inconsistent with the scheme of the Act, then we would be forced to conclude that it would be a failure to bargain in good faith to carry such a demand to the point of impasse. On the other hand, if the demand does not run contrary to the scheme of the Act, it cannot be said that there is any breach of section 14, even though it might be difficult for the complainant to meet this demand. To answer this question the Board must examine both the provisions of the Act establishing provincial bargaining and its provisions dealing with voluntary recognition.

18. The lawfulness of the strike, however, does not make a demand for voluntary recognition at the bargaining table any more consistent with the scheme and purpose of the Act. This scheme clearly requires that a union must establish that it represents employees before it can acquire bargaining rights. The usual method of establishing representation is through the certification procedure set out in the Act. It should be noted that the Act expressly provides a special, and more expeditious, certification procedure for the construction industry. Bargaining rights may also be obtained through voluntary recognition but such bargaining rights may have to be tested under section 52 of the Act, and a determination may be made by the Board that the trade union was not entitled to represent the employees at the time the agreement was made. Given this underlying requirement of representation, the Board must conclude that the taking of a demand for voluntary recognition to an impasse at the bargaining table is conduct inconsistent with the scheme of the Act. While the parties may raise this matter in bargaining it is not an issue that should become the subject matter of a strike. Just as an employer cannot use its economic leverage to bargain out of established bargaining rights, a trade union cannot use its economic leverage to attempt to extend bargaining rights. Such demands, in the Board's view, must be removed from the bargaining table once a strike or lock-out is imminent, or in progress. If such demands are not removed at this time, the party pressing such demand must be held to have breached the duty to bargain in good faith."

Recognition and the scope of the union's bargaining rights were negotiable items, but not objectives for which the parties could invoke economic sanctions.

17. The Board applied a similar mode of reasoning in a different context in *Toronto Star Newspapers Limited* [1979] OLRB Rep. Aug. 811. In that case one union complained that an employer had undermined its bargaining rights by entering into an agreement with another union extending recognition over employees represented by the complainant. The complainant alleged an unlawful interference with established bargaining rights, and the situation was complicated by the close relationship between recognition and the work jurisdictions of the two craft unions involved; however, the Board's reasoning and conclusion are summarized in a long passage to which we might usefully refer. After discussing the scheme of the Act and the statutory mechanism for resolving work assignment disputes, the Board went on to conclude:

23. In *United Brotherhood of Carpenters and Joiners, supra*, the Board found that while the parties could discuss the issue of recognition at the bargaining table it could not become the subject matter of a strike. The Act provides a means for the acquisition of bargaining rights and it is inconsistent with the scheme of the Act to take a demand for "voluntary" recognition to an impasse. Accordingly, the party pressing the demand to an impasse was held to have breached the duty to bargain in good faith. Similarly, the Board is of the view, having regard to the scope of section 81(1) of the Act, that it would not be inconsistent with the overall scheme of the Act to take a demand for work assignments which could form the subject matter of a section 81 complaint (either at the time or upon the actual assignment of work) to a bargaining impasse. The Act provides a comprehensive vehicle resolving these multi-party disputes and hence the issue cannot form the proper subject matter of a strike or lock-out within the context of bipartite negotiations. If taken to a bargaining impasse as in this case, therefore, the issue must be withdrawn from the bargaining table without prejudice to a subsequent hearing under section 81 of the Act. The parties are encouraged to seek voluntary agreement in respect of competing work jurisdiction, as the parties to the instant application have done in the past, by any attempt to use economic sanctions or the immediate threat of same to force a settlement or to compromise the position of another in respect of a work assignment dispute which may become the subject matter of a section 81 complaint is contrary to the scheme of the Act and is, therefore, in violation of section 14 of the Act.

The Board was satisfied that where the Act provides a vehicle for resolving jurisdictional or recognition disputes, the parties are prohibited from resolving these matters by a strike or lock-out. The proper course is for one or both of them to apply to the Board for a declaration clarifying their rights. Thereafter, they can negotiate a collective agreement within the framework thus established.

18. "Reneging" has also been considered in a number of Board decisions; but the fact that one party modifies a bargaining position or withdraws an offer previously made has never been sufficient, in itself, to constitute a "per se" violation of section 14. As the Board noted in

*Pine Ridge District Health Unit* [1977] OLRB Rep. Feb. 65, collective bargaining is a dynamic process which:

“... occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another, and so wish to change its position at the bargaining table.”

The passage of time, changes in economic circumstances, or shifts in the balance of bargaining power can influence one party or the other to reevaluate its position, or insist on concessions not previously sought. Such changes in bargaining posture cannot be automatically equated with bad faith bargaining – although in some cases, of course, an employer’s sudden and inexplicable inflexibility, or a radical change in bargaining stance may provide strong evidence of bad faith bargaining, or support an inference that it is engaging in “surface bargaining” and has no real intention of concluding a collective agreement. In *Wilson Automotive* [1980] OLRB Rep. July 1136, for example, the Board observed that:

“a natural suspicion attaches to the motives of an employer who alters his bargaining position at a critical stage of the negotiations” [and] “this is especially so where the negotiations are for a first agreement”.

In that case the submission of a drastically revised position was one of the factors supporting a finding of bad faith bargaining. Likewise in *Graphic Centre* [1976] OLRB Rep. May 221, the tabling of additional new demands at the “eleventh hour” was construed as an attempt to derail the bargaining process and avoid a collective agreement. (See also: *Fotomat Canada Ltd.* [1980] OLRB Rep. Oct. 1397, and cases cited therein.) On the other hand, in *Pine Ridge District Health Unit, supra*, and *Toronto Jewelry Manufacturers’ Association* [1979] OLRB Rep. July 719, the revocation of a previous offer was not characterized as bargaining in bad faith. Changing economic circumstances justified the change in bargaining posture and in these cases the Board was satisfied that the respondent employer was still prepared to enter into a collective agreement – albeit one more favourable than it had previously sought. Thus the propriety of a party’s conduct, can only be determined after a careful assessment of all of the circumstances including the reasons for the repudiation of the position previously held, and the efforts made to explain the new position to the other party. In *Pine Ridge District Health Unit, supra* the Board put it this way:

“We turn to the final issue. Did the Board of Health further breach the duty to bargain in good faith by reneging on its agreement to Article XXIII, the interest arbitration clause? The revoking of a tentative agreement may well, in some circumstances, be a breach of the duty to bargain in good faith. That will clearly be so when, on the verge of the making of a final agreement a party backs away from its earlier tentative agreement to a major term, having obviously cajoled and deceived the other party in a clear attempt to avoid concluding any final agreement whatsoever. That is, a principle, no different than the lumping-in of surprise demands when final settlement is in sight. (See *Graphic Centre (Ontario Inc., supra)*.)



Either tactic is calculated to wreck the framework in which the parties define and some reasonably to rest their mutual expectations.

That is not to say, however, that parties may never alter their positions on items tentatively agreed to. Counsel for the complainant argued that absent an express understanding there operates a presumption that terms agreed to prior to the making of an overall agreement must be seen as firmly agreed. Counsel for the employer responds that without express notice to the contrary a presumption exists that no term agreed to is firmly agreed to until all items are agreed to and finally ratified. In our view recourse to presumptions is of little help. No two bargaining relationships are the same and each case must depend on the particular relations between the parties at a given point in time. A web of understandings, that are both tacit and expressed, of varying degrees of definitiveness, will operate between them and will colour the quality of their actions.”

19. The respondent seeks to limit the application of the collective agreement to the situation as it existed on July 15th. To this end, it has refused to enter into a collective agreement based on the bargaining unit description determined by the Board, and has insisted that, instead, the recognition clause in the agreement must contain additional language specifically excluding any possible application to the employees of S & M. But S & M and Cybermedix are separate legal entities. The terms of the settlement could not apply to the employees of S & M. Of course, there was a possibility that if the common principles of the two companies subsequently caused them to engage in related economic activities which undermined the union's established bargaining rights at Cybermedix, the union might be prompted to file an application under section 1(4); but the employer is not entitled to demand contractual protection against this contingency by insisting on a modification of the recognition clause so that any such application would be nugatory. A party cannot bypass or “contract out” of the related employer provisions of the Act, and because the settlement as originally framed could not apply to the employees of S & M, it is difficult to discern any other motivation for the respondent's revised position. Just as the union could not strike to force the respondent to extend the scope of the agreement to S & M's employees, the employer cannot precipitate a strike to ensure its continued exclusion or avoid the potential application of section 1(4) should the Board decide that the circumstances justify its application. Insofar as the respondent is seeking to vary the Board's certificate, exclude S & M, and avoid the impact of section 1(4), we are satisfied that its position is inconsistent with the scheme of the Act and, in accordance with the principles enunciated in *Toronto Star* and the *Carpenters'* case constitutes bargaining in bad faith. The scope or extent of the union's bargaining rights must be settled through the established mechanisms provided in *The Labour Relations Act*.

20. We turn now to the question of remedy. The union is seeking a direction requiring the respondent to execute a collective agreement on the basis of the July 15th settlement. We do not think such direction is necessary or appropriate in the circumstances which now exist. There is currently pending before the Board a section 1(4) application which, if successful, could virtually double the size of the bargaining unit, and extend it to almost twice as many employees and locations as were present when the Board issued its certificate and the July 15th settlement was concluded. Had it not been for the actual filing of this application, the Board would have been inclined to direct that the respondent execute a collective agreement based on

the memorandum which it signed on July 15, 1980. For the reasons we have already given, we do not think that it was or is entitled to demand a modification of the recognition clause as a form of "insurance" against a possible 1(4) proceeding; and on all other matters the parties were *ad idem*. Now that the issue has been put before the Board, however, the respondent is entitled to await its resolution. While the likelihood of a section 1(4) declaration may be remote, there may well be matters arising out of this eventuality which the parties should deal with through collective bargaining. Accordingly, the Board does not consider it appropriate, *at this stage*, to direct the respondent to execute a collective agreement on the terms previously agreed to. For the present, the Board considers it sufficient to declare that the respondent's insistence on altering the recognition provision of the settlement (and the Board certificate) is inconsistent with the scheme of the Act and a breach of section 14 thereof.

21. The Board will, of course, remain seized in the event that, following a resolution of the related employer issue, it becomes necessary to deal further with the present complaint.

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**1554-80-R Labourers' International Union of North America – Local 183, Applicant, v. Duracon Precast Industries Ltd., Respondent**

**Certification – Membership Evidence – Representation Vote – Whether irregularity in membership evidence in prior application fraud on Board – Whether second application with fresh membership evidence timely – Whether defects in prior application causing Board to direct vote**

**BEFORE:** R.A. Furness, Vice-Chairman, and Board Members H.J.F. Ade and N. Wilson.

**APPEARANCES:** *B. Fishbein for the applicant; Joseph Carrier and Paul Greer for the respondent.*

**DECISION OF THE BOARD;** January 22, 1981

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
2. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
3. In its reply the respondent made the following statements:

We refer the Board to O.L.R.B. File No. 0997-80-R being an Application for Certification between the same parties. That Application was still alive and active at the time of the within application. Accordingly, this application is untimely.

In view of the apparent irregularities in the earlier Application, it is the

respondent's position that there is a heavy onus on the Union to satisfy the Board that the membership evidence filed in support of this Application is fresh and entirely without irregularity.

4. At the hearing on November 21, 1980, the respondent acknowledged that in Board File No. 0997-80-R the Board had issued the following decision on October 19, 1980:

The applicant has requested leave of the Board to withdraw this application for certification. Having regard to the stage of the proceedings at which this request was made, however, this application is hereby dismissed.

At the hearing the respondent also informed the Board that a hearing of the application for certification in Board File No. 0997-80-R was held on September 5, 1980, and that in a letter from the Board dated October 21, 1980, the respondent was advised:

During the course of the Board's normal signature check based on membership evidence filed by the applicant and specimen signatures provided by the employer, it appeared to the Board that a discrepancy existed between the signature appearing on the application for membership card filed on behalf of Giuseppe Bissola.

Following its usual practice, the Board caused a preliminary investigation to be made. As a result of that investigation, the Board intends to hold a hearing for the purpose of inquiring into the circumstances surrounding the signing of a membership card purportedly on behalf of Mr. Giuseppe Bissola.

The following persons whom the Board believes may have knowledge of the facts surrounding this issue are being summonsed by the Board to attend at the hearing scheduled for Thursday, October 30th, 1980.

Vitorio Ferrari  
G. Bissola  
L. Castaldo

Enclosed herewith is a formal Notice of Continuation of Hearing.

5. On October 22, 1980, the Board received a letter from the applicant in Board File No. 0997-80-R requesting leave of the Board to withdraw its application for certification and also requesting the return of the membership and receipts to the applicant. On October 29, 1980, the Board issued the decision referred to in paragraph four herein. The applicant and the respondent in the instant application are the same as in Board File No. 0997-80-R. While the applicant and the respondent are the only parties in the instant application, in Board File No. 0997-80-R Labourers' International Union of North America, Local 506, intervened and one employee was an objector. The instant application was filed on October 22, 1980.

6. The respondent argued that the applicant had avoided an irregularity with respect to membership evidence by simply requesting leave to withdraw its application for certifica-



tion in Board File No. 0997-80-R. The respondent further argued that the Board's letter of October 21, 1980, may have indicated a fraud on the Board and that the Board should examine this matter of apparent forgery. The respondent also argued that in allowing this to take place, the Board is permitting an abuse of its procedures and was declining to exercise its powers under section 93 of the Act. The respondent also argued that there was a flow through of a taint on the evidence of membership from the application in Board File No. 0997-80-R which reflected upon the ability of the person who completed the Form 8, Declaration Concerning Membership Documents. The respondent characterized the filing of the instant application as an attempt by technical moves to avoid embarrassment and prevent forgery from being uncovered.

7. The applicant informed the Board that there was a discrepancy in its membership evidence in Board File No. 0997-80-R which led to the request to withdraw that application on October 22, 1980. The applicant stressed that the evidence of membership in Board File No. 0997-80-R had been recovered and new evidence of membership had been obtained for the instant application. The applicant argued that where a request to withdraw an application for certification is motivated by a membership irregularity, there ought not to be a bar to the instant application. The applicant informed the Board that the irregularity in the evidence of membership consisted of the signing of a membership application on behalf of one employee by another employee and the subsequent approval of this act by the employee whose name appeared on the membership application.

8. The instant application for certification was filed on October 22, 1980, and the Board postponed consideration of the instant application until the application for certification was dismissed on October 29, 1980. This consideration by the Board is consistent with the provisions of section 92(3)(b) of the Act and no question of timeliness arises with respect to the instant application.

9. As the Board pointed out in *The Ontario Hospital Association* case, [1979] OLRB Rep. March, p. 243, in the circumstances of the instant application, the central question to be considered by the Board is whether the conduct of the applicant with respect to evidence of membership in an earlier application may cause the Board to seek the confirmatory evidence of a representation vote in a subsequent application for certification which invokes the same employer, the same trade union and, to all intents and purposes, the same bargaining unit.

10. The applicant has disclosed to the Board the nature of the irregularity with respect to the evidence of membership in Board File No. 0997-80-R. The nature of the irregularity arose because of the conduct of an employee which subsequently became known to the applicant. There is nothing to indicate that the applicant attempted to mislead the Board. The respondent relied on decisions of the Board in the *Hydro Electric Commission of Hamilton* case, 58 CLLC ¶18,120, and in the *Echlin United of Canada Limited* case, [1965] OLRB Rep. May, p. 91, in support of its proposition that a representation vote should be conducted by the Board. Those two cases involved attempts to mislead the Board and the Board directed a representation vote in each case. These two cases are distinguishable from the instant application in that there has not been a finding by the Board of any intention to mislead the Board. In addition, on the representations before it, the Board is not prepared to find that the applicant had any intention of misleading the Board in the earlier application for certification in board File No. 0997-80-R.

11. The respondent has stated that there is a heavy onus on the applicant to satisfy the Board that the membership evidence is fresh and entirely without irregularity. The applicant has filed fresh evidence of membership in the instant application. The respondent has not suggested how the applicant would satisfy the requirement of being "entirely without irregularity" having regard to the provisions of section 100 of the Act. The respondent has not alleged, and the Board's examination does not disclose, any irregularity in the evidence of membership filed by the applicant. The Board is not prepared to find in the circumstances of the instant application either that there has been an abuse of the Board's procedures by the applicant or that there is a taint in the evidence of membership in the instant application.

12. The applicant has filed a duly completed Form 8, Declaration Concerning Membership Documents. This declaration has been completed on the basis of fresh evidence of membership and there is no indication before the Board that the declarant either in the earlier application or in the instant application did not complete the declaration to the best of his knowledge, information and belief.

13. Having regard to the foregoing, the Board is satisfied that it is not necessary for the Board to seek the confirmatory evidence of a representation vote in this application. The Board notes that the applicant has withdrawn its request that the Board invoke its powers pursuant to section 7a of the Act.

14. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 12, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A certificate will issue to the applicant.

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**1467-80-M; 1824-80-M** The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and Local Union 71 of the Council, Applicant, v. **Eastern Sheet Metal and Mechanical Contractors**, Respondent, v. Mechanical Contractors Association of Ottawa, Intervener #1, v. Mechanical Contractors Association of Ontario, Intervener #2: Mechanical Contractors Association Ontario, Mechanical Contractors Association Ottawa, Applicants, v. **Eastern Sheet Metal and Mechanical Contractors**, Respondent

Construction Industry – Practice and Procedure – Section 112a – Designated employer bargaining agency filing grievance against employer it represents – Whether dispute grievance within meaning of section 112a – Whether Board granting relief where applicant fails to plead section 79

**BEFORE:** N.B. Satterfield, Vice-Chairman, and Board Members C.G. Bourne and W.F. Rutherford.

#### **DECISION OF THE BOARD;** January 26, 1981

1. These are two referrals under section 112a of *The Labour Relations Act* which were consolidated by the Board at a hearing on December 4, 1980. The Board issued an interim decision on December 10, 1980 in which it determined the grievance in Board File No. 1467-80-M. The decision herein deals with the grievance referred in Board File No. 1824-80-M. The interim decision set out the latter grievance in the following terms at paragraph four thereof:

The grievance referred in Board File No. 1824-80-M alleges that the employer is bound to a current collective agreement between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and was also bound to its predecessor collective agreement. The grievance further alleges that the employer has violated both of these collective agreements by failing to pay since April 1, 1980, the required contributions to the industry fund established under those agreements to and on behalf of the Mechanical Contractors Association of Ottawa which is the zone association within the meaning of these agreements that operates within the geographic jurisdiction of the union.

2. For ease and consistency of reference, the Board will refer to the parties in the same terms as were used in the interim decision which were as follows: the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("the council"); its Local Union 71 ("the union"); Eastern Sheet Metal and Mechanical Contractors ("the employer"); and the applicant Mechanical Contractors Association of Ontario ("the association"). The applicant, Mechanical Contractors Association of Ottawa, will be referred to as "the MCA-Ottawa". The decision will refer to the interveners collectively as "the associations".



3. The unusual feature of the grievance before the Board in Board File No. 1824-80-M is that it is brought by the associations against the employer who is represented by the association in collective bargaining in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. The association is the designated employer bargaining agency for the employer pursuant to section 127(1) of the Act. Similar circumstances were dealt with by the Board in its decision in *J. G. Rivard Limited*, [1980] OLRB Rep. July 1009. The associations were the applicant in that case, also. The grievance in that case was brought under the Ontario Provincial Collective Agreement between the association and the council which expired April 30, 1980, and is the predecessor agreement to the one under which the grievance at hand was filed. The Board in *Rivard*, *supra*, considered whether the association, or one of the contractors for which it was the designated employer bargaining agency, could refer a grievance against the other under the provisions of section 112a of the Act. *Rivard* was a contractor represented in collective bargaining by the association. The Board held that, while either of them could refer a grievance under that section, the wording of numerous other sections of the Act made it clear that a collective agreement is between parties of opposing interests and only grievances between such parties might be referred to the Board under the provisions of section 112a. In other words, the Board held that it did not have jurisdiction under section 112a of the Act to determine the issue between the association and *Rivard*. In so doing, the board was following its earlier reasoning in *J. G. Rivard Limited*, [1976] OLRB Rep. Sept. 540, a decision affirmed by the Divisional Court. In the interval between the Board's two decisions, section 112a was amended and section 134(3) was added to the Act. The Board's decision in the later case makes it clear that, in its view, these changes in the Act were procedural in nature and did not alter the correctness of its earlier decision. In this respect, see paragraph twenty of the Board's decision in *Rivard* [1980], *supra*.

4. Counsel for the associations contends that section 112a requires the Board to interpret a collective agreement whenever a grievance is referred to it concerning the interpretation, application, administration or alleged violation of the agreement. More specifically, the Board in the instant referral must interpret clause 17.2 of the agreement, which gives the association the right to bring a grievance against the employer. Counsel contends that the Board in *Rivard* [1980], *supra*, failed to deal with the fact that clause 17.2 had been amended since the Board's decision in *Rivard* [1976], *supra*, to provide specifically for the association to bring grievances against the employers for which it was the bargaining agent.

5. The Board cannot agree with counsel's argument. It ignores the fact that the Board in both *Rivard* decisions found that it did not have jurisdiction pursuant to section 112a to determine the grievance between parties of like interest under a collective agreement because a dispute of that nature was not a grievance within the meaning of section 112a. This is not to say that the provisions contained in the Ontario Provincial Collective Agreement between the association and the council for dealing with disputes of this nature is invalidated by the Board's decision. The Board is declining to make a determination under those provisions because it lacks jurisdiction to do so. Therefore, it would still remain for this type of issue to be determined within the grievance and arbitration mechanisms of the Ontario Provincial Collective Agreement. Nor is the Board's decision to say that it is without jurisdiction to provide relief to the associations in the circumstances of the case at hand. The Board in *Rivard* [1980], *supra*, at paragraph twenty-five, reasons that the non-payment of industry fund dues by an employer, where the collective agreement provides that they be paid, "... is a deviation from the terms of a collective agreement and an employer who is bound by such a collective agreement is in violation of section 134(2) [of the Act]. The substantive provisions of section

134(2) are available to the applicants thereby grounding a request for relief under sections 79(1) and 79(4).”.

6. The grievance at hand was brought under the successor collective agreement to the one with which the Board was concerned in *Rivard* [1980], *supra*. Moreover, the grievance alleges also that the predecessor collective agreement, that is the collective agreement in the *Rivard* case, has been violated by the employer. The language of the relevant sections of the predecessor agreement remained unchanged in the current agreement. The specific grievance in the *Rivard* case involved the failure of the contractor to pay the contributions to the industry fund required under that agreement, which is precisely the issue in the case at hand, wherein the grievance alleges failure to pay those contributions under the current and predecessor collective agreement. In view of these circumstances, the Board adopts the reasoning of the Board in *Rivard* [1980], *supra*, at paragraph twenty as well as paragraph twenty-five, *et seq.* Thus, if the fact in the instant case support the finding of a violation of section 134(2) of the Act, relief is available to the associations under sections 79(1) and 79(4) of the Act even though they have not pleaded section 79. In future, however, if a party is claiming to be aggrieved under a collective agreement by another party to that agreement who is of like interest and the claimant elects not to plead section 79 of the Act, it does so at the risk of the Board declining to exercise its discretion to apply section 79.

[The Board made findings of contravention of the agreement and ordered payment to the applicant].

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**1504-80-R** International Union of Operating Engineers, Local 793, Applicant, v. **Falcon Metals Inc.**, Respondent, v. **United Steelworkers of America**, Intervener.

**Certification – Membership Evidence – Form 8 declarant making telephone inquiries from collectors – Whether satisfactory – Nature of inquiry required discussed**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

**APPEARANCES:** *S. B. D. Wahl, J. Redshaw and M. Quinn for the applicant; M. Patrick Moran and William Scott Bere for the respondent; Gerry Reeds and Jim Keuhl for the intervener.*

**DECISION OF THE BOARD;** January 12, 1981

1. This is an application for certification in which the intervener has filed an application for certification by intervention.

2. The Board finds both the applicant and the intervener to be “trade unions” within the meaning of section 1(1)(n) of the Act.

3. Having regard to the agreement of the parties, the Board finds that all employees of the respondent working at and out of Sudbury, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The applicant has challenged the practice adopted by the intervener in connection with the execution of the Board's Form 8, Declaration Concerning Membership Documents. In particular, the applicant challenges the intervener's long-standing practice of making inquiries of organizers by telephone, so that the Form 8 is executed and sent to the Board from one location and the cards are mailed from another. The applicant also challenges the adequacy of the evidence adduced by the intervener in support of the Form 8 filed herein.

5. The Board has carefully reviewed its own jurisprudence and finds that the intervener's practice of telephone inquiries has never been specifically commented upon. In the present case, the Form 8's were executed and filed by the intervener's District Representative, Mr. Gerry Reeds, whose office is in Toronto. Prior to doing so, he telephoned Mr. Keuhl, the individual in Sudbury in charge of the campaign, and made what he described as his usual inquiries. At that point Mr. Keuhl had 9 membership cards to submit. Mr. Reeds testified that he asked Mr. Keuhl: "Were the cards collected properly, witnessed properly, was the initiation fee paid properly?" He asks this only once, referring to all of the cards collected in that campaign. Having received Mr. Keuhl's assurance, Mr. Reeds then signed the Form 8 Declaration and had it sent to the Board. A tenth card came into Mr. Keuhl's hands subsequently that day, and Mr. Reeds on a later day went through the exercise again, and filed a Form 8 pertaining to that one card.

6. The Board's Form 8 reads as follows:

I, ..... , the .....

<sup>\*applicant</sup>  
of the <sup>\*applicant</sup>~~\*intervener~~ (\*Strike out word not applicable) herein declare that,  
to the best of my knowledge, information and belief:

1. The documents submitted in support of the application represent documentary evidence of membership on behalf of . . . . . persons who were employees of the respondent in the bargaining unit that

<sup>\*applicant</sup>  
the <sup>\*applicant</sup>~~\*intervener~~ herein claims to be appropriate for collective bargaining, on the date of the making of the application.

2. There were . . . . . persons who were employees of the respondent in the bargaining unit that the <sup>\*applicant</sup>~~\*intervener~~ herein claims to be appropriate for collective bargaining on the date of the making of the application.

3. *(Where the documentary evidence consists in part of receipts or other acknowledgements of the payment on account of dues or initiation fees.)* On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names



appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

The applicant argues that the practice of the intervener in carrying out the Form 8 exercise by telephone renders it impossible for the Form 8 declarant to be satisfied that the cards about which he is giving his affirmation are the same ones as those remitted to the Board. This however, appears to raise an unwarranted concern with respect to a system which does not depend on direct knowledge in any event. The declarant, in other words, is permitted to rely on the assurances of others, so long as he asks the proper questions, and it does not appear unreasonable for the Form 8 declarant to rely as well on the assurance that the cards being placed in the envelope are the cards about which he is speaking. In addition, the Form itself refers to the *number* of the cards in respect of which the declaration is signed, so that the only "abuse" which could arise from the intervener's practice would be the substitution of one card for another. This would not appear to be of any significant advantage to an applicant. The Board does not, therefore, find any basis for concern over the intervener's telephone method of making the Form 8 inquiries.

7. With respect to the applicant's other contentions concerning the evidence adduced by the intervener, the Board notes that there has not at any time been raised against the intervener any allegation of non-pay or other card irregularity. The Board has always closely controlled the circumstances under which a full Form 8 inquiry will be conducted, so as to avoid the danger of fishing expeditions (see *Radio Shack*, [1978] OLRB Rep. Nov. 1043, at paragraph 30). The Board in this case finds that there was no onus on the intervener to adduce evidence of the full chain of inquiry concerning its membership cards, nor is the Board prepared to conclude solely on the evidence before it that the questions used by Mr. Reeds in his dealings with Mr. Keuhl were inadequate. It should be noted, however, that an applicant trade union which "streamlines" the form of questioning which it relies upon in ensuring that its membership evidence is regular in all respects may place itself in considerable jeopardy if, as a result, an irregularity goes undetected when completing the Form 8 declaration. See, in particular, the recently-released *Kitchener News*, Board File No. 1482-79-R, October 31, 1980, and *Stanley Steel*, [1972] OLRB Rep. Feb. 181. The objection by the applicant in this case, however, is dismissed.

8. The Registrar is directed to list this matter for continuation of hearing, to deal with all remaining matters in dispute, including the allegation of non-pay raised against the applicant.

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**1460-80-U Service Employees International Union, Local 204,  
Complainant, v. Heritage Nursing Home Limited, Respondent**

**Discharge for Union Activity – Section 79 – Contracting out motivated by cost saving –  
Whether violation of Act**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members W. F. Rutherford and E. C. Went.

*APPEARANCES:* Jeffrey Egner, Carl Morris, Maria Terceira and Maria Oliveira for the complainant; John O'Donoghue, Anthony Baldanza, Mrs. Goldie Berg and Mr. Len Glaser for the respondent.

**DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER E. C. WENT;** January 15, 1981.

1. This is a complaint filed under section 79 of *The Labour Relations Act*. The complainant alleges that the employer, Heritage Nursing Home Limited, has violated sections 56, 58 and 61 of the Act by contracting out work previously performed by employees represented by the union. The union is the bargaining agent for all employees of the nursing home except medical and nursing staff, security staff and office employees. The union has also filed a grievance to arbitration in respect of the same to issue. In this complaint it maintains that the decision to contract out was motivated, in whole or in part, by anti-union sentiment and is therefore a breach of the Act within the principles applied by the Board in *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577 and *Humber College*, [1979] OLRB Rep. June 520.

2. The evidence of Mrs. Goldie Berg, Administrator of the respondent, which the Board accepts, is that after lengthy concern over the cost and quality of cleaning services provided by the Home's own employees, she decided to contract the housekeeping and janitorial work to Cosmos Building Maintenance, and independent cleaning services contractor. As a result, the Home has had better cleaning without the ongoing concern of maintaining cleaning equipment, and has realized a saving of some two thousand dollars (\$2,000) per month. There is no evidence whatever to suggest that the Home or any of its officers were motivated by anti-union sentiment in coming to their decision or that the employer sought, as in *Westinghouse* and *Humber College*, to either limit or eliminate the ability of employees to exercise their rights under *The Labour Relations Act*. Having regard to the evidence, the Board is satisfied that the decision to contract out the respondent's housekeeping work was made entirely for legitimate business reasons. The union argues, nevertheless, that because the employer's action relieves it of obligations under a collective agreement it necessarily involves "collective bargaining factors" which impact adversely on the union in a way contrary to the Act.

3. The facts of this case are similar to those found in *Kennedy Lodge Nursing Home* [1980] OLRB Rep. Oct. 1453. That complaint, by the same union, in the shadow of a similar collective agreement, alleged that another nursing home had illegally breached the Act by contracting out its cleaning work to the same independent service. In that case the Board, faced with the same arguments, made the following observations:

20. If the complainant's argument was accepted, any action taken by an employer, which has an economic impact upon the bargaining unit would lead to an inference that the employer was motivated by anti-union considerations. For example, employer initiated decisions which resulted in the replacement of bargaining unit employees through process change, methods change, equipment change done solely to effect savings in labour costs would, on the basis of the complainant's argument, in and of themselves justify an inference of anti-union motivation. To accept such a conclusion would appear to be directly contrary to section 68 of the Act which provides in part:

'Nothing in this Act prohibits any suspension or discontinuance for cause of an employer's operations... if the suspension, [or] discontinuance... does not constitute a lockout...'

The Board, in the past, has made clear that 'cause' in section 68, *supra*, relates only to 'lawful cause'. If the cost of doing business is too high in relation to the business revenues generated, the employer, who is motivated solely by correcting that imbalance, is not precluded by the Act from taking that action. Absent restrictions in the relevant collective agreement, business operations are not 'frozen' by the collective relationship so long as the action taken is not in any way motivated by the accomplishment of an unlawful objective.

... The facts of this case do not disclose any desire on the part of the employer to rid itself of union representation of its employees. Rather, a legitimate business decision was made which resulted in an annual saving of around \$50,000. The fact that the union and the employees were adversely affected does not of itself taint the legitimacy of that decision.

4. The possibility that an employer might contract out bargaining unit work for legitimate business reasons has become part of the reality of collective bargaining over the last 30 years. There is little jurisprudential support for the notion that a collective agreement is a "no cut" contract of employment given to a union for the period of its term. The fact that clauses limiting the ability of an employer to contract out are expressly included in collective agreements with some frequency is substantial evidence that the general expectation of the labour relations community is to the contrary. If a union wishes to protect itself from the risk of contracting out, it may attempt to do so at the bargaining table where that issue can be dealt with like any other economic issue. (See, *Russelsteel Ltd.* (1966), 17 LAC 253 (Arthurs) and see, generally, Brown and Beatty, *Canadian Labour Arbitration* (Toronto, 1977) at 180-81.) The evidence establishes that in fact in other collective agreements the complainant union has expressly negotiated that protection. In this case it has not. In these circumstances the Board should not lend its remedial authority to fill a contractual gap.

5. In the instant case there are no reasons other than legitimate business reasons established in evidence for the respondent's decision to contract out its housekeeping services. For the foregoing reasons, therefore, the complaint must be dismissed.



## DECISION OF BOARD MEMBER W. F. RUTHERFORD;

1. I dissent.

2. The majority approach in this case and in the recent case of *Kennedy Lodge Nursing Home* is one which will serve to undermine the rights which employees have by virtue of the provision of *The Labour Relations Act*. That Act provides employees with the right (which is protected by a number of provisions of the Act) to join a trade union, participate in its lawful activities, and have that union certified by the Labour Relations Board as the exclusive bargaining agent of those employees. The union is then in a position to bargain with the employer in order to determine the terms and conditions which will govern the relationship between the employer and the employees.

3. Once wages and classifications have been determined by the parties and included in a collective agreement, an employer should not be able to contract out the work covered by those classifications simply to save on labour costs. Whether or not there is evidence of overt anti-union animus on the part of the employer, the fact remains that the obligations which the collective agreement places the parties under have been painlessly avoided. The agreement has been reduced to nothing.

4. I cannot accept the majority view that this result is one which the legislature intended by its inclusion of s. 68 in *The Labour Relations Act*. That section reads: —

68. Nothing in this Act prohibits any suspension or discontinuance for cause of an employer's operations or the quitting of employment for cause if the suspension, discontinuance or quitting does not constitute a lock-out or strike.

In a case where bargaining unit work is still being done, albeit by non-bargaining unit employees, it does not make sense to say that there has been a "suspension or discontinuance for cause of an employer's operations." The operations continue almost as before, but the bargaining rights which formerly applied to that operation have been effectively defeated. I cannot agree that such action on the employer's part should be considered lawful unless there is clear and explicit anti-union animus. When an employer acts, as the employer in this case had done, such action is inherently destructive of employee rights under *The Labour Relations Act*.

5. The majority has also stated that if a union wishes protection from the possibility of an employer contracting out bargaining unit work it must bargain for that protection. This approach overlooks the inherently destructive nature of the contracting out of such work when all that really happens is that different individuals wind up performing the work. The employer has bargained for certain wage rates and job classifications. He should not be able to escape the obligations which he agreed to simply by contracting the work out (it should be noted that a union is not in a position to re-open any of the items in the collective agreement until that agreement has expired).

6. For these reasons, I would find that the employer has violated *The Labour Relations Act* by contracting out its housekeeping and janitorial work.

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**1579-80-R** United Brotherhood of Carpenters and Joiners of America, Local 249 and Carpenters' District Council of Lake Ontario on behalf of Locals 397, 572, 1071 and 1450 of The United Brotherhood of Carpenters and Joiners of America, Applicants, v. **Hugh Murray (1974) Limited**; and Trend Building Systems, owned and operated by 444758 Ontario Inc., Respondents.

**Bargaining Rights – Construction Industry – Related Employer – Board issuing related employer declaration – Union holding bargaining rights for related employer in other Board area – Effect of section 125(2) considered**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

**APPEARANCES:** *D. J. Wray and A. Froatz for the applicants; and H. J. Suedbeck for the respondents.*

**DECISION OF THE BOARD;** January 6, 1981

1. This is an application under section 1(4) of *The Labour Relations Act* in which the applicants seek a declaration that the respondents Hugh Murray (1974) Limited ("Hugh Murray"), and Trend Building Systems, owned and operated by 444758 Ontario Inc. ("Trend") are one employer for the purposes of the Act. The statutory provision directly relevant to the "related employer" issue is as follows:

"1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate."

The Board notes that Hans J. Suedbeck, the owner of both respondents appeared without counsel. Mr. Suedbeck advised the Board that he had spoken to his solicitor about this matter, but had decided to appear on his own.

2. The purpose of section 1(4) of the Act was discussed by the Board in *Brant Erecting* [1980] OLRB Rep. July 945 as follows (at p. 948):

"Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to the employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activity under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights

of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another ...

Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase “whether or not simultaneously”. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section 55. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required after it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union’s bargaining rights ...

... To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act.”

3. The facts in this case are not in dispute. Mr. Suedbeck and his wife are the sole shareholders, officers, and directors of both Trend and Hugh Murray. Mr. Suedbeck exercises effective direction and control, and has the business experience, knowledge of the industry, contacts, and expertise to manage the two companies’ ongoing business activities. He is the real source of entrepreneurial initiative, and it is his capital and financial backing which sustains both businesses.



4. Trend was largely a plan or concept until April 1980 when the Suedbecks decided to incorporate a numbered company as the vehicle through which to conduct the business of Trend and certain unrelated real-estate ventures. Mr. Suedbeck testified that he had created Trend in order to create something of "his own" unconnected with Hugh Murray. He explained that he had purchased Hugh Murray in 1974, but subsequently, as a result of an application under section 55 of *The Labour Relations Act*, found that he was bound by an outstanding collective agreement with the applicant union. Trend was to be an entirely new venture which was unencumbered by any of the obligations of Hugh Murray. Indeed, Suedbeck indicated that Hugh Murray could well be phased out when its existing permanent employees reach retirement age, and thereafter, the Suedbecks' only enterprise would be the numbered company and Trend. Trend presently carries on, or is entitled to carry on, a construction business which is similar to that carried on by Hugh Murray.

5. The first, and only project in which Trend has been involved, is an addition to a cheese factory in Harrowsmith, Ontario near the City of Kingston. This project began in late August or early September 1980. The original factory, and an earlier addition were constructed by Hugh Murray, and Suedbeck admitted that, but for the existence of Trend, Hugh Murray would have done this project. In addition, it might be noted that the project involves "Armco" prefabricated building materials purchased from Hugh Murray which is a franchised Armco dealer – but not the dealer which would ordinarily service the Harrowsmith area. Suedbeck indicated that there was a "gentlemen's agreement" that Hugh Murray would not use Armco products outside its franchise area, but there was nothing to prevent Trend from doing so, or to prevent Trend from purchasing Armco products from Hugh Murray and doing all of the construction work which would otherwise be done by the latter company.

6. Nominally, Hugh Murray and Trend have different business addresses, but this is purely superficial. Hugh Murray has a business address at 36 Harris Crescent in Belleville and the Trend business telephone rings in Mr. Suedbeck's office at that address. Even the reply filed on behalf of Trend in this matter mentioned the Harris Crescent address. The only other relevant address with respect to Trend is the Suedbecks residence. In addition, the two companies have the same bookkeeper, and the office manager of Hugh Murray has prepared employee pay cheques for Trend's employees and done other incidental administrative work for Trend. Miscellaneous secretarial and administrative duties for both companies are performed by Mr. Suedbeck and his wife; and as we have already indicated, the estimating, bidding, and other crucial functions of both businesses are performed by Mr. Suedbeck himself.

7. Hugh Murray is a relatively small construction company owning only two trucks, three trailers and a small amount of construction equipment. Most of Hugh Murray's heavy equipment is rented as the business requires. Trend, likewise, is a small construction company having only about \$1,000.00 worth of its own equipment. It rents one truck and one trailer from Hugh Murray, and when it does so the burnt orange colour scheme associated with Hugh Murray is maintained. While there is no evidence of an ongoing interchange of employees, Trend has sought to hire some of the employees regularly hired by Hugh Murray and Trend's siteforeman is the same siteforeman used by Hugh Murray as its needs require.

8. On the basis of the evidence before us, we are satisfied that Hugh Murray and Trend are engaged in related economic activities under common control and direction and further that we should exercise our discretion to declare the two firms "one employer" for the

purposes of the Act. There remains the question of the effect of this declaration on the applicant's bargaining rights. The critical provision of *The Labour Relations Act* is section 125(2) which provides as follows:

“(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause *e* of section 106, except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.”

9. The language of section 125(2) is somewhat complex but its effect is relatively straightforward. The section applies to all construction activity in the industrial, commercial and institutional sector of the construction industry and its purpose is to extend bargaining rights province wide wherever a trade union had bargaining rights for the employees of an employer in a particular geographic area. One result of the section is that if a local of a trade union has bargaining rights in one part of the province, all other locals of that union in the province of Ontario are deemed to have been recognized by the employer as the representative of employees employed in the ICI sector in their respective geographic areas. These bargaining rights were to be exercised through whatever local of the Carpenters' union has jurisdiction in that particular geographic area. Section 125(2) is one of a series of legislative amendments introduced in order to create a scheme of province wide collective bargaining, by trade, in the industrial, commercial, and institutional sectors of the construction industry. In other sectors, the pre-existing scheme of local area bargaining has been preserved.

10. By a decision dated September 19, 1978, the Board affirmed the bargaining rights of Local 249 of the Carpenters union in respect of the carpenters, employed by Hugh Murray in Board area 29. (For ease of reference, we shall continue to refer hereunder to “carpenters” represented by the applicant although strictly speaking its bargaining rights are somewhat broader than that as will become apparent *infra*). At paragraph 9 of the 1978 decision, the Board ruled:

“Accordingly, there has been a sale of a business within the meaning of section 55 of the Act and the Board declares, as a result thereof, that Hugh Murray (1974) Limited is bound by the collective agreement between the applicant and Hugh Murray Limited and that the applicant has the right to bargain on behalf of all journeymen carpenters and joiners, working foremen and apprentices employed by Hugh Murray (1974) Limited within the area bounded by the counties of Lennox-Addington and Frontenac and the townships of Front Leeds and Lansdowne in the county of Leeds, which is the unit described in the collective agreement.”

Accordingly, section 125(2) extends the bargaining rights of the carpenters' union across the

province wherever Hugh Murray may operate in the industrial, commercial or institutional sectors of the construction industry.

11. By virtue of our section 1(4) declaration, Trend and Hugh Murray (1974) Limited must be considered as "one employer" for the purpose of the Act. It follows that the Carpenters Union (through its constituent local unions) likewise holds bargaining rights for the carpenters employed by Trend in any part of the province in which Trend is engaged on an ICI project, and Trend is bound by the Carpenters' province wide agreement to the same extent as Hugh Murray. In particular, Trend is bound to recognize the applicant's bargaining rights and apply the province wide agreement on the Harrowsmith construction project. Insofar, as work outside the ICI sector is concerned, the Board hereby declares that Local 249 of the applicant holds bargaining rights for the carpenters employed by Hugh Murray and Trend in Board area 29 and must apply the terms of any collective agreement with Hugh Murray applicable in that area. These local area bargaining rights in respect to non-ICI projects, of course, operate in addition to the applicant's province wide bargaining rights and collective agreement applicable to any carpenter employed by either Hugh Murray or Trend on any ICI project in any part of the province. In *Laurentian University*, [1979] OLRB Rep. July 672, the Board declared that the applicant(s)' bargaining rights in respect of carpenters employed in Board Area 12 had been abandoned. This decision was subsequently upheld on judicial review so that in the result the applicant would not have bargaining rights in respect of carpenters employed in "non-ICI" work in that Board area.

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**0088-79-R Ontario Utility Foremen's Association, Applicant, v.  
Hydro Electric Commission of The Borough of Etobicoke,  
Respondent.**

**Bargaining Unit-Certification-Practice and Procedure-Whether unit of foremen appropriate-Whether exercising managerial functions-Parties agreeing to representative group for inquiry into duties and responsibilities-Whether employer can call witness from outside classification-Whether union entitled to call reply evidence from outside representative group**

**BEFORE:** Pamela C. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** *S.B.D. Wahl and L. Siegman for the applicant; Janice Baker and R. W. Brown for the respondent.*

**DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN AND O. HODGES, BOARD MEMBER; January 29, 1981**

1. This is an application for certification.
2. By a decision of the Board dated April 26, 1979, the Board directed the taking of a pre-hearing representation vote. In that decision the Board further appointed a Labour Relations Officer to inquire into and report to the Board on the list and composition of the bargaining unit. The pre-hearing representation vote was taken on May 8, 1979. Pursuant to



the Board's order, the ballots were segregated and the ballot box sealed pending a final determination of the appropriate bargaining unit.

3. The bargaining unit applied for by the applicant is a tag end unit of approximately thirteen foremen who work for the Hydro Electric Commission of the Borough of Etobicoke. The foremen are excluded from the "all employees" bargaining unit represented by Local 636 of the International Brotherhood of Electrical Workers, a unit encompassing the persons supervised by the foremen in question in this application.

4. The respondent asserts that the bargaining unit applied for by the applicant is inappropriate because all of the foremen exercise managerial functions within the meaning of section 1(3)(b) of the Act which reads, in part, as follows:

1(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

The applicant, on the other hand, argues that while the foremen supervise employees, they do not exercise managerial functions because they do not exercise effective control and authority over them.

5. Before evaluating the duties of responsibilities of the foremen in question, we turn to an issue relating to the admissibility of evidence which arose during the course of the Board Officer's examinations into the duties and responsibilities of the foremen. At the outset of the Officer's first meeting, the parties agreed in writing, pursuant to Board Practice Note No. 4, "Procedure of Labour Relations Officer's Inquiry into Duties and Responsibilities", that the evidence given by four foremen would be representative of all persons in the proposed bargaining unit. Following the taking of evidence from these four foremen, counsel for the employer sought to adduce additional evidence from two witnesses outside the bargaining unit. Counsel for the applicant union objected on the grounds that further evidence relating to the duties and responsibilities of the foremen would violate the agreement of the parties. The Officer entertained the evidence in dispute on the understanding that at a later date the matter could be argued before the Board. At the Board's hearing, counsel for the union maintained, in the alternative, that if the employer was entitled to adduce additional evidence from non-bargaining unit persons, it should be able to call proper reply evidence, if necessary, from outside the group of four representative foremen.

6. Paragraphs 8 and 9 of Practice Note No. 4 provide as follows:

8. In a case where a Labour Relations Officer is inquiring into the duties and responsibilities of an occupational classification and there is more than one person in the classification, the parties may agree that the evidence of one person or a number of persons in the classification is representative of the duties and responsibilities of all persons in the classification. Where the parties are unable to agree to one person, or a number of persons, as being representative of all persons in the classification, the

Labour Relations Officer shall advise the parties that an interim report may be issued to the Board before all persons in the classification have been examined. Such a report shall not be issued until the Officer has given the parties the opportunity to adduce evidence regarding all persons already examined. Where an interim report is prepared, a copy of the report will be served to all parties. The parties shall then be given the opportunity to make representations to the Board as to whether it is necessary to examine all persons in the classification. The Board shall hold such hearings, make such decisions, and issue such instructions as it considers appropriate in the circumstances.

9. At the conclusion of an examination of witnesses called by the Labour Relations Officer, the Labour Relations Officer will ask the following question: "Do any of the parties wish to call any (further) witnesses concerning the matters that the Board has referred to me for inquiry and report?" An answer to this question must be obtained from counsel for, or the representative of, each of the parties present at the inquiry and the answer recorded in the Labour Relations Officer's note book. If the answer given on behalf of any party to this question is in the affirmative, the Labour Relations Officer will afford an opportunity to that party to call witnesses, who will, of course, be subject to cross-examination by the other parties.

Practice Note No. 4 provides that instead of examining every person in an occupational classification, the parties may agree that the evidence of one person or a number of persons in that classification is representative of the duties and responsibilities of all persons in the classification.

7. Practice Note No. 4 was amended to its present form following the Board's decision in *Chrysler Canada Ltd.*, [1976] OLRB Rep. August 396. At that time paragraph 8 of Practice Note No. 4 stipulated that instead of examining every person in the occupational classification in question the parties could agree on one person in the classification as being representative of the duties and responsibilities of all other persons in the classification. Unless the parties could agree to one person, and only one person, however, the Officer was required to examine all persons within the classification. At that time Practice Note No. 4 explicitly precluded the modification of the "one or all" procedure even on the agreement of the parties. It read as follows:

8. In a case where a Labour Relations Officer is inquiring into the duties and responsibilities of an occupational classification and there is more than one person in an occupational classification, the Labour Relations Officer is to interview all the persons within the classification, unless the parties agree that one person, and only one, is to be interviewed by the Labour Relations Officer and that the evidence taken from him shall be representative of the duties and responsibilities of all of the other persons in the classification or any named persons within the classification. This rule is not to be changed regardless of any agreement made by the parties, except where several persons in a classification have been examined and the parties then agree that one of such persons is represen-

tative of all persons within the classification and that the Labour Relations Officer need only report his examination of the one person who is agreed to be representative of the classification. Such agreement must be noted in the Labour Relations Officer's report. It is the responsibility of the parties to have available any other witnesses who they require to give evidence on their behalf.

8. In *Chrysler Canada Limited, supra*, the Board's "one or all" approach was challenged. There were 450 persons who fell within the proposed bargaining unit of foremen and general foremen. After 27 of these persons had been examined, both parties asked the Board to accept their evidence as being representative of the duties and responsibilities of all other foremen and general foremen instead of examining the additional 423 persons involved. The Board was attracted to the parties' argument that in the circumstances of their case the "one or all" alternative was unworkable. Notwithstanding the procedural guidelines contained in Practice Note No. 4, therefore, the Board allowed the parties to agree upon the group of persons already examined as being representative of the duties and responsibilities of all the persons in the bargaining unit.

9. Following the *Chrysler Canada* case, Practice Note No. 4 was amended to enable parties to agree at any time that evidence from a group of persons within the bargaining unit would be representative of the duties and responsibilities of all persons in the bargaining unit.

10. It is undisputed by the union that when the Board followed the "one or all" approach, management was entitled to call its own witnesses to give testimony relating to the duties and responsibilities of the persons in question. Not only was this made clear through the last sentence in paragraph 8 which provided, "[i]t is the responsibility of the parties to have available any other witnesses who they require to give evidence on their behalf", but also in the first sentence in paragraph 9 which stated, then and now, that "[a]t the conclusion of an examination of witnesses called by the Labour Relations Officer, the Labour Relations Officer will ask the following questions: 'Do any of the parties wish to call any (further) witnesses concerning the matters that the Board has referred to me for inquiry and report?'" Counsel for the union argues that as the last sentence of paragraph 8 was removed in the amendment to Practice Note No. 4, the Board must have intended to modify its procedure and preclude management from calling witnesses outside the bargaining unit when the parties have agreed on a representative person or group of persons from the disputed classification.

11. The Board cannot accept this suggestion. The Board modified Practice Note No. 4 because the unusual circumstances in *Chrysler Canada* revealed the limitation of the "one or all" approach. There is no suggestion either in *Chrysler Canada* or in the amended wording of Practice Note No. 4 that the parties should no longer be able to have persons from outside the disputed classification give testimony relating to the duties and responsibilities of the persons within the classification. Practice Note No. 4 in its present form simply states in paragraph 8 that the parties may agree that the evidence of either one person or a group of persons in the classification shall be representative of the duties and responsibilities of all of the persons in the classification. The agreement limits the number of persons who may give evidence from within the disputed classification. It does not, however, preclude the production of evidence from persons outside the classification who can provide the Board with a different perspective on the duties and responsibilities of the persons in question. Furthermore, paragraph 9 still requires that the Labour Relations Officer ask the parties whether they have further evidence



to call. The Board finds no support for the suggestion of counsel for the union that paragraph 9 does not apply where the parties have agreed on a representative group pursuant to paragraph 8.

12. In assessing the duties and responsibilities of persons in a disputed classification, the Board is frequently assisted by evidence from persons outside the bargaining unit such as supervisors who, for example, can testify to the extent to which recommendations from persons in dispute are relied upon by superiors in making their decisions. Additionally, higher management can provide a general perspective to enable the Board to appropriately place the persons in dispute in the overall organization of the respondent. Counsel for the union argues, however, that if management wants to present evidence from outside the bargaining unit, from a supervisor or department head for example, then it must insist that all persons in the disputed classification be examined.

13. No appropriate interest would be served by making either party's ability to call witnesses from outside the disputed classification dependent on the absence of an agreement between the parties that one or some of the persons in the classification in question shall be representative of the duties and responsibilities of all such persons. This is particularly true as evidence from a supervisor or department head may assist the Board in assessing the employee status of persons in dispute. The availability of that evidence to the Board should not be linked to the absence of an agreement between the parties on representative persons. The policy reasons for enabling parties to agree on one or some persons in the classification as being representative of all are fully independent of the relevance of evidence from supervisors or other persons outside the classification. Enabling the parties to agree on one or some persons as a representative group within the disputed classification eases the heavy burden that would be placed on the resources of both the parties and the Board if all persons in the classification had to be examined. The significant saving in time and financial resources that flows from the ability of parties to agree that one or some persons in an occupational classification shall be representative of all persons within the classification should not be jeopardized solely because one of the parties wishes to call a witness from outside the disputed classification to provide the Board with a different perspective.

14. For these reasons the Board concludes that an agreement made pursuant to paragraph 8 of Practice Note No. 4 that the evidence of one or some of the persons in the classification in dispute will be representative of the duties and responsibilities of all the persons in that classification does not disentitle either party from calling witnesses from outside the classification to give testimony on the question in issue. Accordingly, in this instance, the respondent was entitled to call Mr. J. Male and Mr. J. A. Cook who are both supervisors above the foremen. Once one party presents witnesses from outside the classification in dispute, however, the other party becomes entitled to present proper reply evidence either from persons in the representative group or from someone else.

15. We turn then to consider whether the foremen exercise managerial functions within the meaning of section 1(3)(b) of the Act.

16. The evidence relating to the duties and responsibilities of the foremen may best be understood by setting out the framework of the respondent's operation as it relates to the foremen. The foremen at Etobicoke Hydro fall into three divisions. In the engineering division – construction segment – there are four kinds of foremen: overhead line foremen, water heater

foremen, underground line foremen and substation foremen. Each of these foremen reports directly to a supervisor. The water heater foreman reports to the service supervisor, Mr. Jack Gardiner. Both of them as well as the overhead line foremen report to the overhead supervisor, Mr. Cliff Cross. The underground line foremen and substation foremen report to the underground supervisor and the substation supervisor respectively. The line of authority then progresses upwards through the supervisors to the assistant construction engineer, and then to the construction engineer, Mr. Jack Male. Mr. Male reports to the assistant to the chief of engineering/general manager who in turn reports to the chief of engineering/general manager. The final step in the chain of authority is the Commission itself. There are therefore approximately six levels of authority above foremen in the engineering department. These foremen are generally referred to as the construction foremen. From this division, testimony was given by Mr. Alex Fox, the water heater foreman, and Mr. Leo Siegman, an overhead line foreman. The Board further had the benefit of direct testimony from their superior, Mr. Male. It did not, however, hear evidence from their immediate supervisors.

17. The second division of the respondent with foremen involved in this application is the operations section which is supervised by Mr. Jack Cook. Within the operations division there are four sections each headed by a foreman: the control room, meters (installation and repairs), stores and the garage. From this section the Board was provided with evidence from the garage foreman, Mr. Bill Chattaway, the control room foreman, Mr. Desrochers, and the foremen's supervisor, Mr. Cook.

18. The third division of the respondent is administration. Mr. Reg Jacklin is the accounting/billing foreman. He reports to Mr. Neil Upshell, the manager of customer service, and then to Mr. Ron Willows the secretary-treasurer of administration. The parties agreed at the outset of the examinations into the duties and responsibilities of the foremen that Reg Jacklin should be examined separately and that the Board's determination of his status as an employee should not affect the Board's determination of the status of the others.

19. With respect to all foremen apart from Mr. Jacklin, the parties agreed at the outset, as discussed above, that the evidence of line foremen Leo Siegman, substation foreman Alex Fox, control foreman Walter Desrochers and garage foreman Bill Chattaway would be representative of the duties and responsibilities of all persons in the proposed bargaining.

20. In making determinations under section 1(3)(b) of the Act the Board has continually recognized that effective collective bargaining necessitates an arms length relationship between employees on the one hand and management on the other. In acknowledgement of a fundamental divergence between the objectives, priorities and interests of the two groups, the managerial exclusion in section 1(3)(b) functions to exclude from the scope of "employee" those persons who, because of the exercise of managerial functions and allegiance to management, would be placed in a position of conflicting interests if allowed to engage in collective bargaining.

21. The term "managerial functions" is not defined by the Act. The Board, therefore, must assess the facts of each case to determine whether the duties and responsibilities in question have true managerial significance. In *Cottage Hospital (Uxbridge)*, [1980] OLRB Rep.

March 304, the Board at pp. 305-306 summarized the approach it takes to evaluating whether an individual exercises managerial functions:

Over the years the Board has developed general guidelines to assist it in evaluating whether an individual exercises managerial functions (see *Inglis Limited*, [1976] OLRB Rep. June 270, *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396 and *McIntyre Porcupine Mines Limited*, [1975] OLRB Apr. 261). For those persons whose work has little or no impact on the employment relationship, the Board looks to whether or not they exercise independent decision-making responsibilities in matters of policy or the running of the organization. The Act does not operate to exclude those who only make effective recommendations in this regard. Nor does it exclude persons whose independent decisions are either circumscribed within pre-determined limits set by others or limited to technical and procedural determinations flowing from their expertise in a limited field. (See *Libby, McNeil and Libby of Canada*, [1967] OLRB Rep. May 193, *Inglis Limited*, *supra*; and *Dominion Stores Limited*, [1976] OLRB Rep. Aug. 44 and *Canadian General Electric*, [1979] OLRB Rep. Jan. 12).

Different considerations apply to the work of a second group of persons who may be characterized as having a direct effect on the employment relationship or the terms and condition of employment of those in the employ of the organization. Supervisors of employees or those technical experts whose work affects terms and conditions of employment or hiring and employment policies would fall within this group. In determining whether such persons whose work has a direct effect on the employment relationship exercise managerial functions, the Board assesses whether or not they exercise effective control and authority over employees either in direct contact with the employees or through their decisions. In making this evaluation the Board looks to whether the person has, at a minimum, the authority to make effective recommendations relating to conditions of employment. An effective recommendation is a 'serious recommendation that the evidence demonstrates is usually acted upon, and therefore a recommendation that materially affects the economic lives of employees'. (*McIntyre Porcupine Mines Limited*, *supra*, at 289).

22. Concerning the evaluation of foremen in particular, the Board made the following comment in *Peterborough Civic Hospital*, [1973] OLRB Rep. Mar. 154 at pp. 155-156:

We have long recognized that in the early stages of industrial organization the foreman was a key person in the management hierarchy. Persons looking for a job came to the foreman, who had the right to hire, to fire, to grant raises and to assign work. The foreman was effectively "the king of the shop" insofar as the employees were concerned. He had a great deal of discretion and he was able to make decisions which greatly affected the welfare of the employees. Moreover, he exercised considerable control over their day to day work life. The evolving position of the foreman in industry is more fully described in the *Spruce Falls Power and Paper Co.*



*Limited* case 47 CLLC ¶16,489, and it is not necessary for us to describe that situation any further.

However, a very important and significant factor in arriving at decisions about whether foremen were managerial was the conflict of interest theory which recognized that foremen owed a duty to management to control and discipline employees, and if the foreman was placed in the bargaining unit so as to become a union member, it would seriously impair his management function. As such, the duty to be owed to management would be incompatible with the trade union interests that he held in common with his fellow employees; *cf. Ferranti Packard Electric Limited*, [1968] OLRB Rep. Sept. 572.

The evolution of industrial organization and the advent of collective bargaining altered the position of the foreman in many situations. He is no longer the “king of the shop”; hiring and firing are done by the personnel department; the work may be controlled by the terms of a collective agreement or where there is no collective agreement the work may be controlled in a similar fashion. The result of the many changes in the hierarchical structure has diminished the foreman’s responsibility to the point where he may be left with the vestiges of power that he once exercised and where he previously stood visibly with management he now stands on the periphery between being a member of management and being an employee.

23. In *McIntyre Porcupine Mines Limited*, *supra*, the Board at pp. 278-279 noted the existence of some “rules of thumb” for foremen. In the industrial context, for example, foremen are generally excluded from bargaining units. In the construction industry a distinction is regularly drawn between working and non-working foremen, with working foremen regularly falling within the bargaining unit and non-working foremen falling outside. These “rules of thumb” merely reflect common practice and are not hard and fast rules. They do not themselves determine whether any particular foreman or group of foremen are employees for the purposes of the Act. Whenever a question arises over the appropriateness of the application of the “rule of thumb” in a particular case, the question must always be whether the foremen in question in fact exercise managerial functions within the meaning of section 1(3)(b) of the Act.

24. The foremen involved in this application exercise supervisory functions. They are each in charge of a group of employees ranging in size from approximately five to twelve employees. To varying degrees they each also perform work of a non-supervisory nature which may include work similar to that performed by those they supervise. Mr. Fox, the water heater foreman, for example, regularly goes on the road and makes calls. If he has the necessary tools with him and a mechanic is not available he might do a water heater repair that would otherwise be done by his men. Mr. Siegman, the overhead line foreman, testified that some days he works with his crew, particularly if they are a man short, and other days he doesn’t “lift a finger”. The control room foreman, Mr. Desrochers, stated that there’s very little actual supervision required in his job because things are well laid out in a manual. While he does not do the work of his men, he spends time on such non-supervisory projects as reviewing and updating maps. Mr. Bill Chattaway, the garage foreman, works the day shift

while his men work repairing vehicles in the late afternoon and evening. Although he does not generally engage in heavy repair work he spends time carrying out such non-supervisory functions as getting problem vehicles started in the morning and ordering parts needed for repairing vehicles. They all, however, spend considerable time exercising supervisory functions.

25. Exercising supervisory functions does not by itself exclude a person from engaging in collective bargaining. Even when a person is primarily engaged in the supervision of others he is not managerial unless he also has effective control over their employment relationship. (See *Falconbridge Nickle Mines Limited*, [1976] OLRB Rep. Sept. 379 and *McIntyre Porcupine Mines*, *supra*.) Scheduling work for employees and co-ordinating their efforts (something regularly done by the foremen in this case) is not itself a managerial function. (See, in addition to the cases previously cited, *Second Manufacturing*, [1975] OLRB Rep. Sept. 658; *Thames Steel Construction Limited*, [1979] OLRB Rep. May 440 and *Caledon Hydro-Electric Commission*, [1979] OLRB Rep. Oct. 924.)

26. To determine whether the foremen in this case exercise managerial functions within the meaning of section 1(3)(b) of the Act, the Board will look to whether or not they exercise effective control and authority over the people they supervise as may be seen by an ability, at a minimum, to make effective recommendations in areas that materially affect the economic lives of the employees. If they act merely as conduits for management and do not themselves effectively control the economic lives of their employees, they would not be exercising functions with true managerial significance. As well, foremen would not be exercising managerial functions if they merely gather facts relating to their men from which management is then able to make its own decisions as to how to deal with particular situations. Even if foremen's evaluations of employees are given serious consideration and are relied on by their supervisors in making their decisions affecting employees, the foremen would not be making effective recommendations unless the recommendations are so consistently and frequently followed that it could be said that through the recommendations the foremen are effectively controlling or determining the decisions. A recommendation would not be effective, for example, if it was merely one of several factors considered or relied on by a supervisor in the course of making his own independent decision. Similarly, foremen would not be viewed by the Board as exercising managerial functions if they merely act within strict supervisory guidelines set by others.

27. Areas of fundamental importance to the economic lives of employees and thus areas that would assist the Board in deciding whether a foreman has effective control and authority over people he supervises would include, among others, the foreman's participation in the hiring, discharging and disciplining of employees, his input into their general performance evaluation, participation in the grievance procedure and, to a lesser extent, the foreman's ability to give time off and assign overtime. We turn then to consider, firstly, the evidence relating to the foremen as a whole and then the segregated evidence of Mr. Jacklin.

28. None of the foremen, apart from Mr. Jacklin, has the authority to hire. They rarely take part in the initial screening or interviewing of the applicants. At times, however, they speak to some applicants either at Mr. Male's or Mr. Cook's request in order to assess an applicant's abilities. Following such a discussion they may be asked verbally for their opinions. Mr. Fox gave evidence relating to one situation where there were about nine applicants for a job but Mr. Male asked him to speak with only two or three of them. It is evident that Mr.

Male had done the initial screening of applicants. Mr. Fox further testified that it was Mr. Male, not himself, who first identified the need for the additional employee. The evidence suggests that an effort is made by management to reach a consensus with a foreman on the choice of the person who will be hired to work under him. While Mr. Male or Mr. Cook may give weight to foremen's opinions, especially in assessing technical skills, there is no indication in the evidence that their opinions are relied on to such an extent that they virtually become the determinative basis of the decision. Mr. Male and Mr. Cook receive applications, interview applicants and form their own opinions as to who should be hired. In so doing, they may ask for a verbal opinion from a particular foreman. The evidence reveals, however, that the opinions of foremen are in general just one factor among numerous others considered by management in deciding which person to hire and cannot be described as effective recommendations. In this regard a distinction must be drawn between input which influences a decision on the one hand and input which forms the effective basis of the decision on the other. (See for example, *Caledon Hydro Electric, supra.*) Mr. Chattaway's evidence highlights the Board's conclusion that while the foremen may provide opinions which may influence the ultimate choice of the persons to be hired, they do not in this regard exercise the power of effective recommendation. In 1976, a person had to be hired to replace Mr. Chattaway when Mr. Chattaway became a foreman. Mr. Chattaway recommended that one of the two applicants be hired. Mr. Cook, however, wanted the other and Mr. Chattaway's recommendation was not followed.

29. As with hiring, the foremen do not have the power to discharge employees. Even Mr. Male does not make the final decision in a discharge. Instead he makes a recommendation to the Chief of Engineering and General Manager who stands above all three of the divisions: administration, operations and engineering. At the time relevant to this application that position was occupied by Mr. John Torrance. Substantial evidence was given concerning the termination of Mr. Stephen Burke, a person supervised by overhead line foreman, Mr. Siegman. Through this incident the Board was provided with a general look at the termination process. Mr. Male testified that when the continuation of someone's employment is brought into question he prepares a report for Mr. Torrance to provide him with a full view of the situation. In his report he would include, for example, the evaluation reports completed by the employee's current foreman, previous reports, be they favourable or adverse, from other foremen who have worked with the employee as well as personnel information concerning the employee's work record, discipline record, training reports, examinations results and educational background. The evidence reveals that it would be Mr. Male, not the foreman, who would then make a recommendation based on the material collected. Mr. Male in turn would pass the recommendation to Mr. Torrance. This pattern was followed in the case of Mr. Burke. The evidence establishes that Mr. Siegman did not himself make a recommendation as to whether or not he should be terminated. Instead, he stated on his evaluation sheet that Mr. Burke lacked the necessary initiative for the job and did not compare in ability to his peers. Though Mr. Siegman's evaluation was given substantial weight, it was not itself a recommendation of what should be done. Mr. Siegman supplied an important opinion which was evaluated by Mr. Male along with other factors. It was part of the factual basis upon which Mr. Male based his recommendation.

30. From Mr. Male's evidence, the Board readily concludes that the foremen under him do not exercise the power of effective recommendation in the termination or discharge of employees. While they may provide important input which may be relied on by someone else, and may at times even become a key factor in a discharge decision, the foreman's evaluation of



an employee is simply one piece in the total picture that is independently assessed by higher management. He is not in these circumstances exerting effective control or authority. The limitation of the foreman's impact of the ultimate decision is revealed in a comment made to the Board by Mr. Male. He stated that he is the person who has the power to recommend discharge and even his recommendation is not always followed.

31. In the operations sections Mr. Desrochers testified that he has never been advised that he has the power to recommend discharge and has never in fact done so though he may have been asked for an opinion. Mr. Chattaway testified that once Mr. Cook decided to extend an employee's probationary period over his verbal suggestion that the individual be let go.

32. With respect to the whole group of foremen the Board concludes from the evidence that the foremen do not exercise managerial functions in the termination or discharge of the employees they supervise.

33. We turn then to the area of discipline. Evidence was given relating to the power of the construction foremen to send people home. Mr. Male testified that a policy was established by higher management (the Commission, Mr. Torrance, the assistant to Mr. Torrance and Mr. Male) to deal with employees who cause problems during the day. It was decided that the appropriate procedure for a foreman to follow in such a situation would be for the foreman to send the employee home. Mr. Male stated in his testimony that sending a person home under these circumstances would not necessarily mean that the employee would not get paid for that time. He stated that that determination would depend on an evaluation of the foreman's reason for sending him home and all other relevant factors. At one of the periodic meetings of construction foremen Mr. Male informed the foremen of the new policy. The evidence does not suggest that the foremen had any input, whatsoever, into the formulation of the policy. In these circumstances the Board concludes that in sending an employee home a foreman would be acting in accordance with guidelines set by higher management rather than exercising his own independent discretion. The lack of managerial significance to a foreman's decision to send an employee home is underscored by the evidence suggesting that the decision as to whether or not the employee would suffer economically as a result of being sent home would be made by someone other than the foreman who would later evaluate all the circumstances. Notwithstanding the policy, all four foremen testified that they had never sent an employee home. Mr. Siegman could not even recall being told at a foreman's meeting that he had such authority and said that he didn't think he would do it anyway without first discussing it with Mr. Male or his assistant.

34. On a more general plane Mr. Chattaway, Mr. Desrochers and Mr. Fox each testified that they had never formally reprimanded their employees. Mr. Siegman stated that if it took more than giving an employee "hell" to solve a problem he would seek guidance from those above him. The Board concludes from the evidence that, as a general matter, when a foreman is unable to solve a problem through a discussion with an employee he seeks the assistance of his superiors.

35. Mr. Siegman gave evidence relating to one time, however, when he signed a written warning. He had difficulty with an employee that he could not solve through discussion. He then went to Mr. Male and his assistant. The evidence reveals that after the employee was given a verbal warning by someone other than Mr. Siegman, presumably Mr. Male or his

assistant, he was then given a written warning by Mr. Siegman. Mr. Siegman testified, however, that Mr. Male made the decision to give the written warning. According to Mr. Siegman's uncontradicted evidence Mr. Male wrote up the warning and sent it to Mr. Siegman both for his signature and for presentation to the employee. Mr. Siegman commented that he doesn't always agree with the discipline being imposed on employees he supervises but that it is imposed anyway. In these circumstances the Board cannot conclude from the fact that Mr. Siegman may at times sign or present a written warning to one of his employees that he exercises the power of effective recommendation in disciplining his employees. Rather, the Board concludes that at most he acts as a conduit for those above him and that it is those above him who in fact exercise the real control in matters in discipline.

36. In the area of discipline, *Chatham Hydro-Electric System*, [1979] OLRB Rep. Sept. 857, a case relied on by counsel for the respondent, is distinguishable from the case at hand. It would appear from the *Chatham* decision that the foremen involved in that case had somewhat greater disciplinary authority than the foremen in this case.

37. The collective agreement states that at stage 1 of the grievance procedure, "the employee shall discuss the grievance with his immediate supervisor". Mr. Male testified that in his view the immediate supervisor is the foreman. Step 2 of the grievance procedure refers to an employee's supervisor rather than immediate supervisor. At this stage the employee provides the supervisor with a grievance in writing and within three working days a reply is required.

38. The evidence reveals that while some of the step 2 replies are signed by foremen they do not actually exert effective control over the contents of the reply. Mr. Male testified before the Board that as a general procedure he confers with the foreman involved to gather the facts relating to a particular grievance. He then relates these facts to higher management, who in turn indicate what position Etobicoke Hydro will take. In this process it is evident that the function of the foremen is to provide the facts upon which those above him make the decision as to whether to allow or deny the grievance.

39. It is clear on the evidence that the interpretation and implementation of the collective agreement is controlled by persons above the rank of foreman. One situation involving Mr. Siegman highlights this conclusion. On one occasion Mr. Siegman told an employee he would be entitled to the payment of bereavement leave when his grandfather had passed away. His interpretation of the relevant article of the collective agreement was immediately overruled by Mr. Male and the bereavement leave was denied.

40. In a similar vein Mr. Male testified that at times he discusses contract interpretation at the periodic meetings of the construction foremen. In an effort to obtain a uniform interpretation and implementation of the collective agreement, he informs the foremen of the intent of the agreement as expressed at the bargaining table and the interpretation placed on the agreement by the Commission. Mr. Male testified that it is expected that the foremen will implement the provisions of the collective agreement relevant to them in accordance with these instructions as passed down from the Commission.

41. Mr. Cook testified that the last grievance he received from the employees under him was ten years ago. Both Mr. Desrochers and Mr. Chattaway stated that they have never handled a grievance. Similarly Mr. Fox and Mr. Siegman stated that they have not received a

written grievance. On the basis of all the evidence relating to the grievance procedure the Board concludes that foremen do not exercise effective control and authority over the men they supervise. Instead they act as conduits for management in carrying out management's interpretation of the collective agreement. They act within prescribed limits and exercise little or no independent discretion in this area.

42. Twice a year changes are made to the crews of the construction foremen in an effort to even out crew imbalances that develop over time. The evidence reveals that while the foremen may make suggestions concerning crew realignment at a foremen's meeting, Mr. Male determines the final changes. Sometimes foremen's suggestions are taken and sometimes they are not.

43. The limitation on a foreman's ability to act independently or to make effective recommendations in pertinent areas is further exemplified by another situation related to the Board by Mr. Siegman. He stated that on one occasion he was reprimanded for allowing an employee to take three weeks' holidays. Apparently, any holiday of more than two weeks must be referred to the office.

44. Restrictions have further been placed on a foreman's ability to temporarily reclassify journeymen to the subforeman level when the subforeman is away. At one time a journeyman was automatically reclassified as subforeman when the subforeman went on holidays. At one of the foremen's meetings, however, the foremen were informed by Mr. Male that the only time they could make a journeyman a subforeman would be if the subforeman was responsible for a job on his own. Similarly, at another foremen's meeting Mr. Male and his assistant, after listening to the foremen's views, informed them of the policy to be followed in preparing overtime hours. While the foremen had input into the formulation of the policy in this situation, the Board cannot conclude on the evidence that their views became effective recommendations.

45. On the basis of all the evidence relating to the duties and responsibilities of the foremen, the Board concludes that they do not exercise managerial functions within the meaning of section 1(3)(b) of the Act. While at one time foremen may have been "kings of the work place" (*Peterborough Civic Hospital, supra*), it is clear in this case that the dispersion of managerial authority has not percolated down the respondent's hierarchy to include the foremen. This is not particularly surprising considering, for the construction foremen at least, the five levels of authority between the foremen and the Commission. Accordingly, the Board finds that they are employees under the Act and entitled to engage in collective bargaining.

46. We turn now to consider the duties and responsibilities of Mr. Reg Jacklin. Mr. Jacklin is the only foreman who works in the administration division of the respondent. His immediate supervisor is Mr. Neil Upshell, manager of customer service. As a foreman in the accounting/billing department Mr. Jacklin supervises a group of meter readers. For residential meter reading there are eight meter readers and two lead hands. In this arrangement Mr. Jacklin commented that the lead hands direct the eight residential meter readers and he directs the two lead hands. For the industrial/commercial work there is a subforeman and four meter readers.

47. Mr. Jacklin testified that he has the authority to grant his employees time off without consultation with his supervisors. He further stated that if someone calls in sick he



can, on his own, move the men around to fill in the gaps including putting employees in different classifications with different wage rates. During the week Mr. Jacklin regularly schedules overtime for this employees. If in a given week an exceptional amount of overtime is required, Mr. Jacklin stated that he would simply call on more people; his initiative in this respect has not been questioned by Mr. Upshell or Mr. Willows. Mr. Jacklin noted, however, that he would not schedule Saturday overtime without consulting Mr. Upshell or Mr. Willows.

48. Unlike any of the other foremen, Mr. Jacklin testified that he has the authority to hire meter readers. He stated that he was advised of this authority when he first came to the job and that over the last five years he has hired between five and ten people. If Mr. Jacklin needs an additional person either he or Mr. Upshell informs the personnel office. He stated that as a matter of courtesy he would discuss the need for a new person with his superiors prior to advising personnel. Personnel provides Mr. Jacklin with a selection of applicants from which he determines which persons to interview. Concerning the ultimate selection of a person, Mr. Jacklin stated that if one person is clearly more qualified than the others he would decide, without consultation, which person should be hired. If he has difficulty deciding who would be the best person he would consult Mr. Upshell who then might take part in an interview. Mr. Jacklin maintained, however, without contradiction, that the final choice would be his own.

49. Mr. Jacklin further testified that in his opinion he has the authority to re-classify employees without talking to Mr. Upshell although he usually would. He stated that Mr. Upshell has never disagreed with his initiatives in this area.

50. With respect to the scheduling of vacation Mr. Jacklin stated that he has the discretion to determine the needs of his department and decide how many people may be away at one time.

51. On the basis of the evidence relating to Mr. Jacklin, the Board concludes that in several areas Mr. Jacklin, has, at least, the power of effective recommendation and exercises managerial functions within the meaning of section 1(3)(b) of the Act. In reaching this conclusion we rely particularly on his undisputed authority to hire employees. Mr. Jacklin, therefore, will be excluded from any bargaining unit the Board may find to be appropriate.

52. By a letter dated April 12, 1979 the Board advised the applicant Association that it appeared from a check of the Board's files that the Board had not found in any previous proceeding that the applicant was a trade union within the meaning of section 1(1)(n) of the Act. As the trade union status of the Association has not yet been established either in this proceeding or any other, the Board directs that a hearing be scheduled to enable the parties to present evidence and argument relating to that issue.

53. The final disposition of other outstanding matters must await the Board's determination of the status of the Association.

54. The matter is referred to the Registrar.

#### **DECISION OF THE BOARD MEMBER J. D. BELL:**

1. I disagree with the decision of the majority that the foremen in the operations sec-

tion and the engineering section of the respondent do not exercise managerial functions within the meaning of section 1(3)(b) of the Act.

2. These foremen do exercise supervisory functions almost exclusively. Their discretion may be narrowly confined in some areas such as hiring and firing but this is common in a public utility which is tightly controlled by the Commission, a politically sensitive body.

3. This case is similar to *The Windsor Utilities Commission*, [1971] OLRB Rep. May 296. At paragraph 9 page 298 the Board stated:

“In the instant case, the disputed persons are engaged, almost exclusively, in the performance of supervisory functions. Even though such supervisory functions are enforced through recommendations rather than independent action and there is no real discretion in disciplinary matters, the fact that almost 100 per cent of the non-working foremen’s time is spent in the performance of such supervisory functions and virtually no physical work is performed, it must be found that their functions, when viewed as a whole, are managerial functions within the meaning of section 1(3)(B) of the Act. While the rate payers may question the necessity of the extent of supervision given the line men who are supervised by the line foremen, it is not for this Board to determine whether such supervision is really required. this Board can only determine whether supervision is exercised and need not determine whether it is justified.”

I would find these foremen when their functions are viewed as a whole, exercise managerial functions within the meaning of section 1(3)(b) of the Act and therefore are not employees for the purposes of the Act.

4. Accordingly this application should be dismissed.

#### **CONCURRING OPINION OF BOARD MEMBER O. HODGES;**

1. The dissent of my colleague Mr. Bell refers to *The Windsor Utilities Commission* case in support of his contention that the “foremen” in the instant case should be excluded under 1(3)(b). It is to be noted that the *Windsor Utilities Commission* case, the employee representative on that panel of the Board, Mr. E. Boyer, dissented as follows:

“I dissent. I find nothing in the functions performed by the disputed persons which can be characterized as managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act* and I accordingly find that they are employees of the applicant for the purposes of the Act.”

2. In the *Windsor Utilities Commission* case the disputed classification was that of “non-working foremen”. Para. 3 of that case:

“3. The evidence clearly established that each of the disputed persons was a non-working foreman. The majority of their time is spent supervising other employees and, except in isolated cases of emergency, they do

not perform any of the physical work performed by the employees they supervise. While they have power to make recommendations concerning the work and attend regular foremen's meetings, they have no real discretionary authority except in strictly circumscribed areas."

The facts in the earlier case relied on by Mr. Bell and the facts in the present case are distinguishable in two important aspect referred to in para. 3 above.

– the foremen found to be employees under 1(3)(b) in the present case are not restricted to working only in "isolated cases of emergency."

– nor do they have discretionary authority in labour relations matters "in strictly circumscribed areas", or otherwise.

3. Paragraph 9 of the *Windsor Utilities Commission* case states: "the fact that almost 100 per cent of the non-working foremen's time is spent in the performance of such supervisory functions and virtually no physical work is performed ...". that fact is not compatible with the facts in the present case. Moreover, "supervisory work" cannot be assumed to include duties which the Board regards as criteria essential to a finding excluding persons under 1(3)(b). The case relied on by Mr. Bell lacks the specifics of the "supervisory work" which in my opinion are required.

4. With great respect to my colleague, I do not see his dissent as well founded in the reference to The *Windsor Utilities Commission* case.

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**0852-79-M;0853-79-U** The Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers Local Unions 700, 721, 736, 759, 765 and 786, Applicant, v. The Ontario Erectors Association and **Ins-Co Sarnia Ltd.**; Respondents: Sarnia, Ontario, Canada Building and Construction Trades Council, on behalf of its constituent members, save and except International Brotherhood of Boilermakers, Iron, Shipbuilders, Blacksmiths, Forgers and Helpers, Local Union No. 128, Complainant, v. International Brotherhood of Boilermakers, Iron, Shipbuilders, Blacksmiths, Forgers and Helpers and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and **Ins-Co Sarnia Ltd.** and John McManus and Marcel T. Beauchamp, Respondents.

**Construction Industry – Section 79 – Section 112a – Employees discharged after unlawful strike – Several local unions affiliated to council filing applications – Council settling all matters in dispute with Employer Association – All but one local union withdrawing applications – Whether local union bound by settlement**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members D. B. Archer and J. A. Ronson.

**APPEARANCES:** *S. Simpson and J. Harrower for The Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers Local Unions 700, 721, 736, 759, 765 and 786; R. B. Cumine for The Ontario Erectors Association; B. Blackwell for Sarnia, Ontario, Canada Building and Construction Trades Council, S. T. Goudge for International Brotherhood of Boilermakers, Iron, Shipbuilders, Blacksmiths, Forgers and Helpers; and D. J. McKillop, Q. C. and M. Beauchamp for Ins-Co Sarnia Ltd. and Marcel T. Beauchamp.*

#### **DECISION OF THE BOARD; January 29, 1981**

1. This matter involves complicated multi-party proceedings brought under both sections 79 and 112a of *The Labour Relations Act*. The sole issue currently before the Board is whether a settlement stated to be a final settlement of all matters in dispute between the parties and accepted by all of the unions involved, except Local Union No. 700 of the International Association of Bridge, Structural and Ornamental Ironworkers ("Ironworkers Local 700") is binding on Local 700 and precludes the local from continuing these proceedings. Among the other parties involved in this matter are the Sarnia, Ontario, Canada Building and Construction Trades Council ("the Building Trades Council"), the International Brotherhood of Boilermakers, Iron, Shipbuilders, Blacksmiths, Forgers and Helpers ("the Boilermakers International"), Local 128 of the same International ("Boilermakers Local 128"), the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("the U.A. International"), Labourers' International Union of North America, Local 1089 ("Labourers Local 1089"), International

Union of Operating Engineers Local 793 (“Operating Engineers Local 793”) and Ins-Co Sarnia Ltd. (“Ins-Co”).

2. File No. 0853-79-U is a complaint under section 79 of the Act filed by the Building Trades Council on behalf of all of its constituent members, save and except Boilermakers Local 128. The Building Trades Council is comprised of a number of union locals having jurisdiction in the Sarnia area. Each of these locals is affiliated to one of the International Building Trades Unions. Ironworkers, Local 700 is one of the constituent members of the Building Trades Council.

3. The section 79 complaint alleges that the various respondents to the complaint have violated sections 3, 56, 58, 59, 60, 60a and 61 of the Act. The main thrust of the complaint is that Ins-Co improperly discharged certain employees belonging to local unions affiliated to the Building Trades Council, including employees who were members of Ironworkers Local 700. Indications are that Ins-Co discharged the employees following an unlawful strike precipitated by a picket line manned by officials of a number of the union locals. One of the issues raised by the complaint is the status of a purported collective agreement entered into between Ins-Co on the one hand and the Boilermakers International and the U.A. International on the other hand. Central to this issue is the question of whether employees covered by the purported collective agreement were engaged in work in the construction industry, as that term is defined in section 1(1)(f) of the Act, or whether they were performing maintenance work outside of the construction industry.

4. At the relevant time, Ins-Co was bound to construction industry collective agreements also binding on three locals belonging to the Building Trades Council, namely Ironworkers Local 700, Labourers Local 1089, and Operating Engineers Local 793. The discharges which precipitated the section 79 complaint could also be construed as a breach of these collective agreements. Accordingly, each of these union locals filed a grievance against Ins-Co alleging that its members had been discharged contrary to the terms of the applicable collective agreement and then referred the grievance to the Board for a determination under section 112a. (File Nos. 0852-79-M, 0952-79-M and 0969-79-M. Operating Engineers Local 793 also referred a second related grievance to the Board in File No. 0968-79-M.) It was the contention of Ins-Co that the employees referred to in the grievances had not been employed on construction industry work and accordingly had not come under the construction industry collective agreements but rather had been employed under the collective agreement between itself and the Boilermakers International and the U.A. International. Thus each of the section 112a’s raised basically the same issues as did the section 79 complaint: namely, whether the employees were employed on construction industry work and the propriety of the company’s action in discharging them.

5. At the hearing into the merits of these matters, the same counsel who appeared for the Building Trades Council also appeared on behalf of Operating Engineers Local 793 and Ironworkers 700 with respect to their section 112a referrals. Labourers Local 1089 was represented by different counsel with respect to its section 112a referral. On the first day of hearing the Board acceded to the request of the parties that the various section 112a referrals and the section 79 complaint be consolidated.

6. The Board heard evidence with respect to the merits of the section 79 complaint and the section 112a referrals on some ten different days. From almost the very commencement of

the hearings, the Board was advised that the parties were actively engaged in settlement discussions. (Although the Ontario Erectors Association, which as a party to the Ironworkers Provincial Agreement was named as a respondent in the section 112a referral filed by Ironworkers Local 700, made it clear that it would not take part in any settlement discussions.) For extended periods of time, the Board at the request of various of the parties, adjourned its hearings so as to allow settlement discussions to continue.

7. On January 17, 1980, a memorandum of settlement was executed by Mr. B. Blackwell, the President of the Building Trades Council, Mr. M. Beauchamp, the President of Ins-Co, Mr. J. Carroll, a Vice-President of the Boilermakers International, and Mr. R. St. Eloi the Director of Canadian Affairs for the U.A. International. The memorandum was stated to constitute a final settlement "of all matters in dispute". The memorandum provided that local unions affiliated to the Building Trades Council who were willing to participate would be allowed to represent their members on the relevant job site. Ins-Co also undertook to satisfy its manpower needs by employing members of the local unions. The agreement went on to provide, in part, as follows:

*"Item #3 – Discharged employees*

The company will commence hiring immediately the employees as required.

*Item #5 – Ins-Co Labour Board Action*

Ins-Co to withdraw its action immediately. (This was a reference to application under sections 82 and 123 of the Act filed by Ins-Co against certain individuals and union locals concerning the unlawful strike referred to earlier. Ironworkers 700 (in error referred to as Local 1700) was named as a respondent in both applications.)

*Item #6 – Building and Construction Trades Council of Sarnia and Lambton County*

Council to withdraw its action immediately. (All parties understood this to be a reference to the section 79 complaint.)

*Item #8 – Labourers, Engineers & Ironworkers Action*

Union to withdraw their actions immediately. (All parties understood this to be a reference to the section 112a referrals.)

The purported effect of this settlement is not disputed. It represented an exchange of concessions and a resolution of all outstanding matters in dispute. The issue remaining as we have already noted, is whether it is fully binding upon Ironworkers Local 700.

8. On January 18, 1980, counsel for Operating Engineers Local 793, (the same lawyer who acted on behalf of the Sarnia Building Trades and Ironworkers Local 700) wrote to the Board with respect to both of the Operating Engineers 112a referrals as follows: "The parties have settled this matter and in the circumstances, request leave that this matter be withdrawn".



9. On January 25, 1980, the Board received separate telegrams from both the business manager and counsel for Labourers Local 1089. The telegrams stated that on the basis of the memorandum of settlement, the local was withdrawing its section 112a referral. On January 28, 1980, counsel for Ins-Co wrote to the Board advising that pursuant to the memorandum of settlement it was withdrawing its applications under section 82 and 123 of the Act. Counsel also advised that pursuant to the terms of settlement Ins-Co had hired twenty-eight individuals.

10. On January 22, 1980, counsel for the Building Trades Council and Ironworkers Local 700 wrote to the Board as follows:

"As you know by now, a substantial portion of the section 60 complaint was settled and all that remains outstanding in the completion of this complaint is that aspect of the complaint that relates to the Ironworkers. In that context, I am instructed by Bruce Blackwell to request leave of the Board to withdraw all other aspects of the section 79 complaint herein. Under separate cover I am forwarding the Operating Engineers' request to withdraw the related section 112a application.

Following receipt of this letter, all that will remain of the lengthy Ins-Co proceedings will be the Ironworkers Section 112a and the Ironworkers claims reflected in the above matter."

11. The position taken by Local 700 triggered an almost immediate response from Mr. Blackwell, the President of the Building Trades Council, who was clearly under the impression (shared by all of the other parties) that the matter had been resolved. On the morning of January 24, 1980, he sent a telegram to Ironworkers Local 700 in the following terms:

"Please be advised that I am requesting you to withdraw Local 700 from 112a which you have before the Labour Board any action which is contrary to this request or compliance with this request must be confirmed by telegram on this date".

12. On January 24, 1980, Mr. Blackwell also sent a telegram to counsel who had been acting on behalf of the Building Trades Council. The text of that telegram is not before the Board, although the thrust of its contents can be deduced from the following reply to Mr. Blackwell from counsel; also dated January 24, 1980:

"received your telegram January 24, 1980. I cannot withdraw the section 79 completely. It is filed by the council on behalf of the named members one of which is the Ironworkers. One of my clients is the Ironworkers and an internal conflict cannot be resolved by me. I can send each of you to different lawyers but I cannot withdraw without Ironworkers approval. I could not reach Phair and received specific instructions to this effect from Norm Wilson.

I hope you and the Ironworkers can resolve this problem without my referring you elsewhere because that would be devastating to the Ironworkers case in the middle of their case."

13. On January 28, 1980, the Board received a telegram from Mr. Blackwell, the

President of the Building Trades Council, stating that the Council was withdrawing the section 79 complaint "in its entirety" and that the Building Trades Council was no longer represented by the counsel who had previously been acting on its behalf.

14. As already indicated, the issue now before the Board is whether, and to what extent, this complicated matter has been settled. In particular, the question is whether Ironworkers Local 700 can continue the section 79 complaint insofar as it relates to Ironworkers, and whether or not it can proceed with its section 112a referral. For its part, Ins-co takes the position that if the memorandum of settlement is not dispositive of all of the matters in dispute between the parties, then the company should not be considered bound by any part of the terms of the memorandum of settlement.

15. The Board listed the matter of the status of these proceedings for hearing at which Ironworkers Local 700 was represented by newly-retained counsel. At the hearing, counsel for Ins-Co was not challenged in his contention that all of the terms of the memorandum of settlement have been acted on, except with respect to the withdrawal of the proceedings insofar as they relate to the Ironworkers. Counsel for Ins-Co was also not challenged when he stated that the company had requested that Ironworkers Local 700 supply the company with tradesmen, but the local had refused to do so.

16. Evidence was led at the hearing concerning the authority of Mr. Blackwell to bind Ironworkers Local 700 in executing the memorandum of settlement. The evidence indicates that Local 700 was from the beginning content to participate in the section 79 complaint through the Building Trades Council, but that it decided on its own to file a grievance and refer it to the Board under section 112a. As a consequence, the local separately retained the services of the same lawyer on its section 112a referral as had been retained by the Building Trades Council, and paid a part of the lawyers total bill calculated in accordance with his view as to the proportion of his time accorded to the Ironworkers Local 700 112a referral. As a member of the Sarnia Building Trades Council, Local 700 was also assessed a portion of the lawyer's bill to the council. As we have already indicated however, the distinction between the two sets of proceedings was largely illusory because they involved essentially the same parties and issues, and had been consolidated by order of the Board.

17. On or about January 14, 1980, there was a meeting of the Sarnia Building Trades Council to discuss a proposed settlement of the matters in dispute. At the meeting, Mr. Blackwell, the President of the Council, read out the terms of the above referred to memorandum of settlement. Through their representatives a majority of the locals affiliated to the Council voted to adopt the proposed settlement, and accordingly that became the decision of the Council. Representatives of Ironworkers Local 700 attended at the meeting, but did not vote. Mr. James Harrower, the acting business agent of Ironworkers Local 700, testified that at the meeting, he stated that the local was not withdrawing its grievance. Mr. Jim Phair, an organizer for the Ironworkers International and former business representative of Local 700, also attended the meeting as a representative of Local 700. Mr. Phair testified that at the meeting he indicated that the local would not stand in the way of a settlement but that the Building Trades Council could not withdraw the local's 112a referral "or any of our action". In our view, this statement was entirely contradictory, for, as must have been obvious to Mr. Phair, the issues were inextricably intertwined and if there was to be a settlement, it had to be a comprehensive one. Notwithstanding Mr. Phair's comments, Mr. Blackwell signed the memorandum of settlement which purported to settle all of the matters in dispute.

18. In assessing the current status of the proceedings, one cannot over-emphasize the interrelationship between the section 79 complaint and the section 112a referrals. They all arose out of the same set of facts and seek similar remedies. As already indicated, in our view because of the interrelationship between them, if a settlement was to be arrived at, it would reasonably have to have been a settlement of the section 79 complaint and all of the section 112a referrals. Because of this, and taking into account the fact that all three unions which had filed 112a referrals were members of the Building Trades Council, and that the section 112a referrals had been consolidated with the section 79 complaint, when Mr. Blackwell, the President of the Council, held himself out of the respondents as having authority to settle all aspects of the matter, including the section 112a referrals, it would have been reasonable for the respondents to believe that he did have such authority. Although Ironworkers Local 700 were aware of the fact that the terms of settlement voted on at the meeting of the Building Trades Council purported to bind them insofar as both the section 79 complaint and its section 112a referral were concerned, nevertheless the local took no steps to advise the respondents that it would not be bound by the terms of such a settlement.

19. Having reviewed the facts of the case, we are satisfied that the Building Trades Council had been given the authority by Ironworkers Local 700 to act on its behalf in the section 79 complaint. It is not at all clear whether Mr. Phair's comments at the meeting on January 14, 1980 were meant to withdraw from the Building Trades Council the authority to settle the section 79 complaint insofar as it concerned ironworkers. However, we are satisfied that the ability to settle the ironworkers portion of the section 79 complaint was within the apparent or ostensible authority of the Building Trades Council. It appears that the Building Trades Council did exceed its actual authority in settling the Ironworkers Local 700 112a referral. However, in all the circumstances, we believe the ability to settle the 112a referral was also within the apparent or ostensible authority of the Building Trades Council. In this regard, it is of interest to note that both Operating Engineers Local 793 and Labourers Local 1089 felt that the Building Trades Council did have the actual authority to settle their section 112a referrals, and both of these locals withdrew their referrals in compliance with the terms of the memorandum of settlement. Certainly Ins-Co believed that the matter had been settled and it implemented the settlement to the extent that it could.

20. The law in situations such as this is expressed as follows at 1 C.E.D. (Ont. 3rd) at pages 4-27 and 4-28:

¶ 15 "Agency by estoppel arises where one person has so acted as to lead another to believe that he has authorized a third person to act on his behalf, and that other, in such belief, enters into transactions with the third person within the scope of such ostensible authority. The first mentioned person is estopped from denying the third person's agency and it is immaterial whether the ostensible agent had no authority or merely acted in excess of it."

¶ 16 "An agent may bind his principal by acts done within the scope of his general and ostensible authority, although those acts may exceed his actual authority as between himself and his principal, the private instructions which limit that authority, and the circumstances that his acts are in excess of it, being unknown to the person with whom he is dealing."



21. When the Building Trades Council settled the Ironworkers Local 700 portion of the section 79 complaint as well as its section 112a referral, it was acting within the scope of its ostensible authority and since Ins-Co was not aware that the Building Trades Council might have been acting in excess of that authority, we are satisfied that at law the terms of the settlement are fully binding on Ironworkers Local 700. We make no comment on what recourse, if any, Ironworkers Local 700 might have against either the Building Trades Council or Mr. Blackwell.

22. These matters having been settled by the memorandum of settlement dated January 17, 1980, these proceedings are hereby terminated.

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**1704-79-R; 0764-80-U Service Employees' International Union,  
Local 183, Applicant, v. K-Mart Canada Limited (Peterborough),  
Respondent, v. Group of Employees, Objectors.**

**Certification – Charges – Damages – Practice and Procedure – Section 7a – Constant surveillance and isolation of union supporters – Whether disciplinary warnings calculated to discourage testifying before Board – Employer conducting series of employee meetings about unions – Whether union may raise discharge complaint where discharge took place after hearings commenced – Whether Board awarding compensation for harassment and humiliation suffered**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

*APPEARANCES: M. Mitchell, V. Nicholls and P. Marier for the applicant; R. MacDermid, Martin Szczepaniak and C. A. Cumiskey for the respondent; Linda Schweier, H. Hughes, Joan Robbins and M. Swift for the objectors.*

**DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER O. HODGES; January 26, 1981**

1. Kelly O'Connor and Beverley Clark work in the K-Mart store in Peterborough. Miss O'Connor has worked there for 5 years and is a sales clerk in the toy department. Mrs. Clark, with 4 years experience in the store, is a sales clerk in hardware. In October of 1979 they decided to explore the possibility of a union to represent them and their fellow employees in their relations with their employer. Before long they became the in-plant leaders of a full scale union organizing campaign.

2. The campaign became a bitter struggle resulting in this application for certification coupled with a complaint under section 79 of the Act, requiring some sixteen days of hearing. The union's application contains charges of unfair labour practices against the employer, including allegations that employees were subjected to unlawful surveillance, intimidation to prevent them from testifying in Board proceedings and discharge. The union submits that because of the employer's unfair labour practices it has been unable to obtain a majority of the store's employees as members. It alleges that the employer's interference has been such that the employees could not freely express their choice on the question of union representation and

that the Board should therefore grant the union a certificate on the basis of the extraordinary provisions of section 7a of *The Labour Relations Act*. That section provides as follows:

7a. Where an employer or employer's organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

3. The three issues in this application are: first whether the employer has breached *The Labour Relations Act*; second, if it has, whether its conduct would have deprived employees of the ability to choose freely to be represented by a trade union either in a membership card campaign or in a representation vote; the final issue is whether, if the first two conditions are satisfied, the union has membership support sufficient for the purposes of collective bargaining with the employer (hereinafter referred to as "K-Mart"). To assess these issues the Board must review the evidence in some detail.

4. Mrs. Clark's sister-in-law is a union steward. Through her she was introduced to Mrs. Phyllis Marier, an organizer with the Service Employees International Union, Local 183. One evening in mid-October Mrs. Clark called Ms. Marier. She arranged for herself and Kelly O'Connor to meet with the union organizer at the Holiday Inn in Peterborough shortly thereafter. Within a day or two the three met at that location. Mrs. Marier explained to Clark and O'Connor the outlines of a union organizing campaign and they volunteered their services.

5. The campaign plan was fairly simple. Miss O'Connor and Mrs. Clark were to approach other employees to see if they were interested either in joining the union or learning more about it. If they were, Clark or O'Connor would instruct them to meet with Mrs. Marier at the Holiday Inn, usually during the evening, to have union membership explained to them and, if they wished, to sign a union membership card. Starting October 30, 1979 the campaign went forward on that basis. On instructions from the union organizer both employees took care to keep the campaign out of the sight of management and, to the same end, to avoid employees they knew would be sympathetic to management.

6. The first ten days of the campaign were successful. Between October 30th and November 7th, 31 of the 90 or so employees in the store joined the union. During that time management was unaware of what was happening. That soon changed.

7. On November 8, 1979 the store's manager, Robert Hugh Gilchrist, received a telephone call. The call came from K-Mart's head office in Toronto, from Mr. C.A. Cumiskey, the Vice-President of K-Mart in charge of industrial relations. Mr. Cumiskey informed Mr. Gilchrist that a union was attempting to organize in the Peterborough store. Cumiskey instructed Gilchrist to investigate immediately and to let him know what he could find out. Gilchrist immediately instructed Mr. Thomas, the co-manager of the store and Mrs. Osborne, the store's personnel manager, to find out whether there was any union activity in the employees' ranks. In very little time the store manager confirmed through the store's

pharmacist that there was a union organizing campaign under way. Gilchrist immediately made a return call the Cumiskey to confirm the union's presence. With that K-Mart began mobilizing to defeat the union.

8. Mr. Cumiskey immediately told Mr. Gilchrist that he would be in Peterborough the next day. Cumiskey also called Mrs. Jennie Fox, the national Manager of Personnel and Employee Relations for K-Mart Canada Limited. Normally based in Toronto, Mrs. Fox was then on the road in Winnipeg. Mr. Cumiskey told her of the union activity in Peterborough and instructed her to return immediately to go to the Peterborough store with him on the following Monday, November 12, 1979. Within hours of learning of the campaign initiated by Kelly O'Connor and Beverley Clark, K-Mart had arranged to have the two highest ranking personnel executives in the country in its Peterborough store.

9. Mr. Cumiskey arrived at the Peterborough store at 8:00 a.m. on Friday, November 9th. He met initially with Mr. Gilchrist, the store manager. At Cumiskey's request Mr. Gilchrist arranged a meeting to include themselves and the six department managers in the store. That meeting was held that afternoon. According to the evidence of Mr. Gilchrist the meeting consisted of Mr. Cumiskey advising the departmental managers as to what posture they should take with respect to the union. By Mr. Gilchrist's account Mr. Cumiskey told the department managers that they should not comment on the union and that they should direct any questions on that subject to store manager Gilchrist, to the co-manager, Mr. Thomas or to the personnel director, Mrs. Osborne.

10. During the course of the day Mr. Cumiskey held a second meeting, this time with the management trainees in the store. That meeting was not attended by Mr. Gilchrist. Since neither Mr. Cumiskey nor any of the management trainees testified in these proceedings there is no evidence before the Board as to the purpose or content of that meeting. That becomes significant in light of later events. In the hierarchy of K-Mart, management trainees are not unlike officer cadets. While they are subordinate to the department managers in the store from the standpoint of taking instruction, they are in a superior classification, being groomed for higher managerial positions. There are some five management trainees in the Peterborough store. One of them, Mr. Gordon Cooke, is classified as assistant-manager and is responsible for half of the store, known commonly as the "hard-line" section. The hard-line area includes hardware, the department in which Beverley Clark works. Another management trainee, Derek Kilby, is classified as an area assistant-manager. At the material time he was responsible for the toy department in which Kelly O'Connor was employed.

11. On November 9th, having met with the department managers and the management trainees, Vice-President Cumiskey also circulated among the employees in the store, as he normally does on any store visit. He stayed in the store until approximately 4:00 p.m. The Vice-President returned the next morning, Saturday, November 10, 1979 and continued to tour the store for an additional two hours.

12. The company's efforts to get as much information as possible about the union campaign did not end with the disclosure of the store pharmacist that there was union activity among the employees. The evidence of Mr. Gilchrist establishes that through all of Friday and Saturday he continued to receive more information about the union's activities through his co-manager, his personnel manager, the department managers and Mr. Patrick Ryan, a management trainee.



13. The union submits that the evidence respecting Mr. Ryan is particularly significant. At the time in question Mr. Ryan's girlfriend, Madelen Heddon, worked as a sales clerk in the jewellery department. Lorraine Langley, a clerk in the camera department, testified that she phoned Heddon one evening during the union campaign, asking her to go to the Holiday Inn to sign a membership card. Ms. Heddon was willing, but because she did not have transportation it was arranged that she would sign a card at work the next day. The next day, which was either November 8th or November 9th, Madelen Heddon refused to sign a card. According to Langley, Heddon approached her in the store in tears. She stated that her boyfriend, Mr. Ryan, had been given instructions in Mr. Gilchrist's office that if he did not obtain information for management about the union he would lose his job. Langley further testified that she approached by Heddon later that weekend at a banquet. Heddon was again visibly upset and, according to Langley, said that both she and Mr. Ryan would lose their jobs and that Langley was "to blame for getting [them] into this mess."

14. Counsel for the respondent objected, maintaining that the Board should put no weight on this evidence in that it was hearsay. While the evidence is hearsay insofar as it relates to the communication between Mr. Ryan and his superiors, it is admissible direct evidence going to the fact that Miss Heddon was visibly troubled at the time and that she had an abrupt change of heart about the union. Insofar as it relates to alleged surveillance activities of management trainee Ryan, it is not probative. However it is not inconsistent with other direct testimony. Mr. Gilchrist testified that Mr. Ryan approached him on the 9th or 10th of November and told him that Ms. Heddon had been approached by the union. Mr. Gilchrist's evidence further discloses that Madelen Heddon later came to him in his office and gave him a full account of how she had been approached. It is clear from Mr. Gilchrist's own account that Miss Heddon's purpose in so doing was to demonstrate her faithfulness to management and to put as much distance between herself and the union as she possibly could in the eyes of her employer.

15. On Monday, November 12, 1979 things began to change for Kelly O'Connor and Beverley Clark. That day national and local management of K-Mart met in Peterborough and planned their strategy of response to the union's campaign. Also that day the store's manager, Mr. Gilchrist, held the first of a number of meetings with the store's employees on the subject of the union. And that day Kelly O'Connor and Beverley Clark became the victims of what the Board can only describe as a ruthless campaign of surveillance that endured for some three weeks.

16. The evidence of surveillance is particularly disturbing. On or about November 12, 1980 Miss O'Connor noticed that management trainee Eric Kilby was following her everywhere that she went in the store. She and Kilby were then working together to prepare the toy department for the Christmas season. In those circumstances they would naturally spend a good part of their working day together. But what happened went well beyond that. Miss O'Connor noticed that if she went to the drinking fountain Kilby would go with her. Whether or not it was convenient, Kilby would take his coffee break at the same time as Miss O'Connor and would sit at the same table. If she shortened her break and came back to work prematurely he would get up and do the same. At all times for two weeks, except during lunch hours, she was never out of Kilby's sight.

17. During this same period Miss O'Connor was advised that she was to take no telephone calls paged to her department. Previously she had always been paged when there

was a call to the toy department. During this period all calls and pages were directed specifically to Mr. Kilby. The Board accepts the evidence that Miss O'Connor was more familiar with the products in the department than Mr. Kilby. In the normal course she was the logical person to answer calls to the department, the bulk of which were in the nature of customer inquiries about stock. The Board is satisfied that the decision to channel all calls to persons other than Miss O'Connor was a deliberate attempt to isolate her because of her union activities.

18. Once during the two weeks that she was under Mr. Kilby's constant surveillance Miss O'Connor asked the management trainee why he was following her. He answered "I'm sorry, I can't talk about it". After two weeks of surveillance by Kilby, Mr. Cooke took over as the management trainee in the toy department. He also took over the surveillance of Miss O'Connor. For the period of approximately one week Mr. Cooke subjected Miss O'Connor to some of the most humiliating treatment of an employee that this Board has yet encountered. Cooke, who did not testify to rebut any of the evidence about his conduct, told Miss O'Connor that she was not to leave the department under any circumstances without first getting his permission. One one occasion Miss O'Connor asked Mr. Cooke for permission to go to the washroom. He responded "Okay, I'll take you". Then, in full view of other employees he walked her from the toy department through the store to the ladies' washroom where he stood outside waiting for her.

19. In the weeks that Miss O'Connor was being followed and watched by Mr. Kilby, Mrs. Clark was being constantly observed by Mr. Cooke. In the period immediately after November 12th, Mr. Cooke was working in the hardware department, just as Mr. Kilby worked in the toy department. During this time if Mrs. Clark left the hardware floor to go to the stockroom or to another department Mr. Cooke would be right beside her. According to her unchallenged evidence he was always within one counter's distance, in such a way that he could constantly see what she was doing and hear what she was saying. Just as Kilby did with Miss O'Connor, Cooke would follow Mrs. Clark on her coffee breaks and always return at the same time. This he would do notwithstanding that the hardware department might be left uncovered for a period of time, contrary to normal practice.

20. On one occasion Mrs. Clark was speaking to a friend in the store, discussing Mrs. Clark's forthcoming wedding. She then noticed Mr. Cooke was present, as always, and was listening. With understandable annoyance she said to him "If you are going to listen you might as well join the conversation. Isn't it true you are supposed to listen to all my conversations?" Mr. Cooke replied "Well yes, I am supposed to". K-Mart did not call its management trainee as a witness to deny that evidence. Nor did the employer call Mr. Cooke to deny the further testimony of Mrs. Clark that, as with Kelly O'Connor, his surveillance of her extended to the indignity of following her to and from the door of the ladies' lounge. Like Kelly O'Connor, Beverley Clark was effectively isolated in the work place. She too was prevented from taking any telephone calls during this period, with all calls to hardware being routed to the management trainee, contrary to previous practice.

21. The evidence discloses that the employer's open surveillance and isolation of O'Connor and Clark was extremely effective. It was plain to other employees that the two union organizers were known to their employer and were being subjected to constant observation. During this time other employees avoided Mrs. Clark and Miss O'Connor. During breaks they, and the two management trainees who followed them, tended to find themselves

sitting apart from everyone else. Occasionally other employees asked Clark and O'Connor whether they didn't fear for their jobs. There was no doubt about the employer's feelings: during the same period of time, as elaborated below, K-Mart conducted a battery of meetings with the store's employees which the Board concludes were intended to discourage them from joining the union. The surveillance of Clark and O'Connor ended just as abruptly as it began. It ceased when the employer received notice that the union had applied for certification and was making charges of unfair labour practices against K-Mart. The intimidation of Miss O'Connor and Mrs. Clark did not end there, however.

22. The second day of hearing for this application took place in Toronto on February 8, 1980. That day Miss O'Connor, Mrs. Clark, Mr. Douglas Byers and Barry Elford, all of whom were employees sympathetic to the union, appeared at the hearing with the union's representatives and its counsel. Since the application on its face alleged breaches of *The Labour Relations Act* by K-Mart, it was apparent that these employees would be giving evidence against their employer in that regard. As it turned out the day was devoted entirely to preliminary legal argument; by the end of the day no evidence had been called. That same day the manager of the K-Mart store, Mr. R.H. Gilchrist wrote the following letter to Mrs. Clark, Miss O'Connor, Mr. Byers and Mr. Elford:

It has come to our attention that you have been talking to employees during working hours for the purpose of persuading them to become members of the Service Employees International Union. For your information, Section 62 of *The Labour Relations Act* of Ontario provides:

"Nothing in this Act authorizes any person to attempt at a place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union. R.S.O. 1970, c. 232, s. 62."

Please cease engaging in this activity during working hours.

Yours very truly,

"R. H. Gilchrist" (signed).

23. At the outset of the next hearing, on February 13, 1980, counsel for the union brought the above letter to the Board's attention. He submitted that it was intended purely as a veiled threat to discourage the four employees from giving evidence and further participating in the hearings on behalf of the union. He asked the Board to find that the disciplinary warning, issued as it was against four potential witnesses on the day they were to testify, constituted an attempt to unlawfully interfere with the participation of employees in proceedings before the Board, contrary to section 71 of the Act which provides, in part:

71.-(1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

(a) refuse to employ or continue to employ a person;

(b) threaten dismissal or otherwise threaten a person;



- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

Both parties were given a full opportunity to adduce evidence and make representations on this serious allegation.

24. The evidence establishes that by the beginning of February there was no active union campaign in the store or, for that matter, among the employees outside the store. The uncontradicted evidence is that the union campaign had ceased in early December and that by early February, with the extreme position taken by the employer and with the matter before the Board, there was little, if any, talk about the union among the employees. It is clear from the evidence before the Board that Mr. Gilchrist was aware as early as November 12th that Miss O'Connor and Mrs. Clark had been talking to employees in the store for the purpose of persuading them to become members of the union. In the total context of this case, which includes extensive anti-union conduct on the part of the employer as will be described in more detail below, the fact that only these four employees received disciplinary warnings on February 8, 1980, the same day that they first appeared to give evidence against the company, leads the Board to the inescapable inference that the letter was intended primarily as a means of intimidation, calculated to give them second thoughts about giving evidence damaging to K-Mart.

25. The Board finds therefore that K-Mart Canada Limited knowingly and deliberately attempted to intimidate four union witnesses in contravention of section 71 of the Act. The fact that the respondent sought later to apologize to the employees and withdraw its letter when it became known to the Board does not change the quality of its act nor does it diminish the impact of that unlawful conduct on the respondent's employees. While all unfair labour practices are equally unlawful, the Board must view with special concern violations of section 71 of the Act. The Act and proceedings before the Board under it are the means established by law to protect employees involved in a union against the unlawful abuses of their employer. Any attempt to interfere with the ability of persons to testify in Board proceedings must be viewed as the gravest misconduct, striking as it does at the very root of the statutory framework fashioned by the Legislature to allow employees to pursue freely the right to engage in collective bargaining. K-Mart's attempt to interfere with the Board's procedures will be further addressed in considering the Board's remedial order.

26. K-Mart's anti-union campaign was not aimed only at employees who were known union sympathizers. November 12th marked the beginning of a highly visible and broad campaign by the employer against the union. That day the employer held the first of a great number of meetings with the employees to voice its position and to encourage the employees to oppose the campaign of the trade union. Similar meetings were held November 15th and 16th

as well as on November 22nd, 23rd and 24th. A further meeting was held on November 30th and December 1st and a last one on December 13, 1979. Generally each employee was exposed to five separate meetings. Under Mr. Gilchrist's direction the employees were brought into the ladies' lounge in the store in groups of approximately ten to fifteen. Each time the employees, who were kept in the same groups, were given a prepared statement by Mr. Gilchrist. These statements, copies of which were filed in these proceedings, were drawn up in consultation with Mr. Cumiskey and Mrs. Fox.

27. The speech given by Mr. Gilchrist on November 12th was as follows:

I'm going to talk to you about unions. Particularly about the attempt presently underway to unionize this store. Should you prefer not to listen, you are free to leave right now and return directly to your department (I really mean this). A number of you have come to me and told me you were asked to attend a union meeting or asked to sign a union card. You ask me what should I do, should I sign? Well I can not tell you what to do because that is against the law, however I believe there are some serious questions you should ask yourself before you do anything.

1. Am I prepared to sign away my rights?
2. Do I want to give up my rights to talk directly to Mrs. Osborne or myself?
3. Do I want to pay union dues for the privilege of working at K-Mart.
4. Do I know whether dues or other charges can be raised at any time without notice?
5. Will such dues and other fees that will be required if I belong to a union be worth this added expense to me?
6. Is it necessary for me to join a union to work at Kmart?
7. What assurance have I that a union can do more for me than I can do for myself?

*For example* If you want a day off for a wedding I'm sure if you give Mrs. Osborne sufficient notice she will work it out for you.

Now just ask yourself if a third party was to go to Mrs. Osborne on your behalf do you think she would be as obliging?

*Vacations* Mrs. Osborne does her utmost to accommodate you all for your vacations. As you know during some weeks in the summer many are off at the same period leaving the store with very few full time because your husbands are off and we want you off too if possible.

Now if you have a union your vacations would go by seniority and only so many would be off at one time.

*Let me ask you.*

How much are the union dues? You mean nobody told you. What did they tell you? That you would immediately get \$6.50 per hour? A schedule with no nights, few Saturdays? Really their promises are for much more. Really, if we were to schedule everyone 10-6 we would be falling over each other. Ask yourself would we require the same number of full time help we have?

Who is going to pay \$6.50 per hour? The union? What do you think if a union came to us and said we want \$6.50 per hour? Just what do you think the answer would be? Let me tell you in case you have any doubts the answer would be a very firm no and before the union can give you anything they must deal with us.

*Then what happens?*

Do you go on strike?

I'm new as a manager as you know but I know of you and have felt at home here since I moved to Peterborough 3 years ago. Don't you feel free to talk to me? If you have a problem, don't you feel – I will do my best to operate fairly? If you had a problem why didn't you come to me? You didn't have to go outside. The question was asked – What happens if I don't sign a union card? Will I be fired? You will never have to sign a union card for the privilege of working at Kmart. You will never have to pay union dues to some one else for the privilege of working here.

For some strange reason people feel obligated when contacted by a union organizer. It is really no different than if you were visited by an insurance or door to door salesman. If you were not interested you would simply say so *Loud and Clear*.

I am not against unions in the right place. I believe if I worked in a factory I would probably be in favour. However in our situation I believe we can serve your best interest by operating this store Union Free.

We have a personnel supervisor just for you. I don't need a personnel supervisor. I can get schedules from Toronto office, make minor adjustments and post them weekly. Mrs. Osborne is here to serve your interest. You also know that if you are dissatisfied with Mrs. Osborne's answer you see me and if you are dissatisfied with my judgement you know you can discuss it with our District Manager and further you can write or phone our Toronto office, or call the labour board or we could call the labour board together. You may decide – I don't want a union but I don't want to get involved so I just won't sign a card. It doesn't work that way, you see if enough people sign, you may get dragged in against your will. If you don't want a union then you have the right to be vocal about it. Say you don't want it loud and clear. You can't sit on the fence. We have sometimes felt that we will give you the opportunity to ask some questions



however we may have to take a rain check before we can answer your questions. It may be necessary in order to protect myself legally for me to answer your question at our next meeting. We hope this meeting had made you aware of your rights. Remember the choice to belong or not to belong to a union is yours.

28. With slight variations the same themes were pursued through all of the twenty-five or so meetings which management held in separate small groups with the employees. At each meeting the employees were told that they were free to leave, although each meeting was held on the employer's time and not during a break or after working hours. Not surprisingly, it appears that no employee ever got up and left one of these meetings.

29. Counsel for the union objects to what he characterises as subtle threats to the employees throughout the speeches. In the speech of November 12th, for example, he maintains that Mr. Gilchrist is hinting that the employer will be uncooperative in giving employees time off if the union should come to represent them. He also objects that the employer threatened to remove any flexibility in the choice of vacation time, a factor of considerable concern to a number of the employees, most of whom are female and many of whom wish to dovetail their vacation time with their husbands'.

30. Counsel for the union expressed special concern about the reference to the number of employees who would be required to work at the store if the union campaign were successful. He submits that the passage referring to the scheduling of employees was in fact an insidious way of raising an association in the minds of the employees between union affiliation and losing their jobs. There is no evidence whatever that any employee was promised by the union that everyone would be scheduled from 10:00 a.m. to 6:00 p.m. Counsel for the union implies that K-Mart simply created that false issue as a vehicle to convey a threat to the employees about their job security in the event that the union should find majority support among them. The union also objected to what its counsel characterized as a veiled instruction to the employees to mobilize against the union. In this regard he points to the following passages in various speeches:

- Say you don't want it loud and clear. You can't sit on the fence. (November 12th)

- I just want to emphasize again it is your responsibility alone, if you do not want a union say so loud and clear. Employees can voice their opinions freely and openly and are not restricted in the same manner as management. (November 15th)

- The company and I believe that it is in your best interest to operate this store union free. If you are not interested, say so loud and clear. (November 22nd).

31. These meetings must be viewed in their context. In all of them a small group of employees were present with the store manager, the personnel manager and in most of them, Mrs. Fox, the national director of employees relations for K-Mart Canada Limited. The meetings took place over a time when the two principal union organizers were being openly watched every minute of the working day. Even Joan Robbins, one of the employees opposing the application, testified that she had heard of the surveillance during that time.

32. At least one consequence, if not the purpose, of these meetings was to identify and isolate employees who were sympathetic to the union. Employees were invited to ask questions or make statements; those who spoke were invariably the employees most opposed to the union. No one spoke in favour of the union, and in the context of a small meeting employees who secretly favoured the union would naturally feel more and more exposed, if only by their silence.

33. It is evident to the Board that the purpose of the meetings was not to inform the employees. Mr. Gilchrist raised the same questions over and over again, as in his rhetorical references to union dues, without ever attempting to answer them in subsequent meetings. An employer is of course, within the limits established by the Act, entitled to express its views about unions. The issue is whether the nature and content of the speeches, in the context of which they were given, was a violation of *The Labour Relations Act*.

34. The Act protects the right of an employer to express its views about the representation of its employees by a union. The very scheme of the Act contemplates that union and employer will be opposed in interest. There is nothing in the Act that restricts or makes illegal an employer's predisposition to remain union free. An employer is free to communicate its feelings in that regard so long as it does not do so in a way that brings intimidation, coercion or undue influence to bear on its employees. Section 56 of the Act provides:

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

35. In *Words and Phrases Legally Defined* (London, 1970) undue influence is defined in part as:

"The unconscientious use by one person of power possessed by him over another to induce the other to enter into a contract."

In the context of *The Labour Relations Act* undue influence includes the unconscientious use by an employer of its power or authority over employees in order to induce them to forego their rights in relation to a union. An employer exerts undue influence on its employees, and thereby breaches the Act, when it takes unfair advantage of its position and authority in an attempt to sway the will of the employees. The line between legitimate employer expression and undue influence is not easy to draw in the abstract, and can only be assessed on a case by case basis.

36. In this case the Board cannot accept that it was necessary for the employer to conduct what might have been, by Mr. Gilchrist's own account, as many as twenty-five separate employee meetings on the subject of the union. The evidence establishes that once a week there is a regular meeting of the employees in the store prior to opening. If it had been Mr. Gilchrist's intention merely to communicate to the employees the viewpoint of K-Mart

about the union campaign this could have been done by one statement in a single meeting or by a single memorandum to all employees. By breaking the employees down into small groups and confronting them in repeated meetings with three high ranking members of management, in circumstances where employees opposed to the union were invited and encouraged to speak out, the employer went beyond the bounds of free speech. It abused its authority in a deliberate attempt to pressure its employees into opposing or abandoning the union both by the form of the meetings and the subtle threats communicated in the speeches.

37. That conclusion finds further support in the conduct of Mrs. Fox. Part of Mrs. Fox's job as Manager of Personnel and Employee Relations involves visiting the various K-Mart stores across Canada. Sometimes she may visit as many as five stores in a period of six days when she is out of her Toronto office. Her visits to stores are normally fairly brief, and usually involve discussions with management and circulating through the store to speak with employees. Prior to the time in question Mrs. Fox last visited the Peterborough store briefly in November of 1978 and once in the spring of 1979.

38. The union campaign in Peterborough brought about a substantial change in Mrs. Fox's normal pattern. Her travel time for all of November and December of 1979 was spent entirely in the Peterborough store. She was in the Peterborough store from November 12th to November 23rd and again from November 27th to November 30th and in the month of December she was also in the store on the 5th, 13th and the 14th. These periods of time encompassed practically all of the days on which meetings were conducted with the employees by Mr. Gilchrist. Notwithstanding her evidence to the contrary, the Board is satisfied that the union campaign was the reason, and the only reason, for her presence in the store for that sustained length of time. She collaborated with Mr. Gilchrist and Mr. Cumiskey in the preparation of the speeches to be given to the employees and, as the Board has noted, she attended the majority of the small group meetings where employees were addressed about the union. After each meeting Mrs. Fox would circulate among the employees in the store, ostensibly to discuss their problems. Not surprisingly the discussions often turned to the union. According to Mrs. Fox, K-Mart employees tend to feel free to talk openly with her. Mrs. Fox testified that on the first day or so that she was in the store people were reluctant to talk about the union but that after the meetings they felt freer to do so. By her own account, towards the end of the first week employees told her who among them was involved in the union.

39. During one of her tours of the store Mrs. Fox engaged Mrs. Clark, one of the two original employee union organizers, in conversation. Mrs. Clark protested to Mrs. Fox that she and Kelly O'Connor were being followed by the management trainees. Mrs. Fox's testimony is that she then went to Mr. Gilchrist to advise him of what was going on and that he then said that he would look into it. The Board cannot accept that evidence. Mr. Gilchrist, who was cross-examined extensively on the question of the surveillance of O'Connor and Clark, maintained throughout his evidence that he was unaware of any surveillance of the two employees or of any complaints made by them about being followed. On this, as on other crucial aspects of the evidence, the company's account takes on an aura of falsehood that borders on contempt for the truth. The chief witnesses for K-Mart were Mr. Gilchrist and Mrs. Fox. The testimony of each of them was lacking in candour as they repeatedly evaded questions and contradicted themselves and each other. Having regard to the totality of the testimony the Board can place no credence whatever on the evidence of Mr. Gilchrist and Mrs. Fox. On the whole of the evidence the Board must draw the inference that like the speeches of Mr. Gilchrist and the tours of Mrs. Fox, the surveillance and harassment of Miss O'Connor and Mrs. Clark were planned, approved and known by Mrs. Fox, Mr. Gilchrist and Mr. Cumiskey, the Vice-President of K-Mart Canada Limited.



40. The impact on individual employees of being engaged repeatedly in conversation by a managerial authority of Mrs. Fox's rank cannot be underestimated, particularly when it comes at or about the time of a series of management meetings opposing a union. Mrs. Fox circulated continuously among the employees for three weeks in November. An employee observing her conduct as she spoke with other employees could reasonably suspect that Mrs. Fox would eventually come to know who the union sympathizers were, as indeed she did. An employee exposed both to the battery of meetings held by Mr. Gilchrist and the sustained rounds of the store by Mrs. Fox would reasonably come to entertain a concern for his own security, a concern that joining the union would leave him open to the kind of surveillance and pressure that was then being openly brought to bear on Clark and O'Connor. Management's deliberate blitzing of the employees can only be interpreted by this Board as calculated to put pressure on the employees, to obtain information from them and to bring undue influence to bear on their ability to freely choose to associate with the union. The tactic of having Mrs. Fox attend the anti-union meetings of Mr. Gilchrist and then circulate among the employees, engaging in one on one conversations day after day over several weeks, goes beyond mere management concern for employee problems. It becomes a subtle and effective tactic of intimidation. While a one or two day visit by Mrs. Fox to convey the employer's feelings on union representation might not offend the provisions of section 56 of the Act, her presence and activities in the store during the fall of 1979 went beyond that purpose and, in the circumstances of this case, constituted intimidation and undue influence of the employees contrary to section 56 of the Act.

41. The Board heard a considerable amount of evidence respecting the circulation of petitions against the union. Petition activity, which began immediately after the first meeting held by Mr. Gilchrist on November 12th, was sponsored principally by employees Joan Robbins, Linda Schweier and Myrtle Swift. The petition eventually filed by these employees is not numerically relevant to the certification application because the union did not obtain membership support in excess of fifty-five per cent of the employees in the bargaining unit.

42. The union sought, however, to establish that the petition was inspired and encouraged by the employer, submitting that the petitioners were in fact the instrument of the employer's overall design to split the employees and defeat the union. The petition may have some further bearing, to the extent that, if voluntary, it would speak to the union's strength among the employees for the purposes of issuing a discretionary certificate under section 7a of the Act.

43. The evidence clearly establishes that the employer acted as a catalyst to the petition. The evidence of Joan Robbins, which the Board accepts as honest and forthright, establishes that she was first made aware of the union's campaign in the store by Mr. Gilchrist's speech on November 12, 1979. The same was true for Myrtle Swift. Mrs. Fox testified that during the course of the first week she visited the Peterborough store employees approached her, asking how they should proceed to oppose the union. She responded that she could not discuss that with them, and that they should call the Labour Board for that information. That is precisely what Myrtle Swift did. Having obtained information from the Board she proceeded with the assistance of Joan Robbins, Linda Schweier and others. It is clear from the evidence that the three ladies who sponsored the petition were genuinely and voluntarily opposed to the union. While it is true that they might not have mobilized but for the prompting of Mr. Gilchrist and Mrs. Fox, the Board is satisfied that apart from that the sponsors of the petition acted in-

dependently of their employer. They can in no way be associated with the breaches of the Act found to have been committed by K-Mart.

44. That is not to say that the existence of the petition is a neutral fact in the case before the Board. Given the atmosphere created in the store by the employer, including the open surveillance of Mrs. Clark and Miss O'Connor, the continuous small group meetings and the constant presence of Mrs. Fox who admitted that she became aware of the petition, it would not be unreasonable for employees to fear that a refusal to side with the objecting employees would become known to their employer and leave them open to the risk of being dealt with like Miss O'Connor and Mrs. Clark. The Board must conclude, for the purposes of the section 7a application, that notwithstanding the good faith of its three sponsors, the petition, in the circumstances of this case, must reasonably be viewed by previously undecided employees as an invitation to stand up and be counted on the anti-union side and that a refusal to do so would be at their peril. We are satisfied that the petition cannot, on the balance of probabilities, be accepted as a voluntary statement by the rank and file employees who signed it. Exposed as they were to speeches of Mr. Gilchrist that contained threats to their well being and job security, to the inquiring presence of Mrs. Fox and to the oppressive measures being used against Clark and O'Connor the employees could not sign that document free of intimidation and undue influence. It cannot, therefore, be looked to with any reliance to assess the measure of support for the union among the employees in the bargaining unit.

45. We turn to consider the allegation that the employer unlawfully discharged Geoffrey Clifford Hurle because of his union sympathies. The evidence establishes that Mr. Hurle, a full-time student at Carleton University, was hired by the respondent to work as part of its security staff for the summer, beginning on or about June 16, 1980. On Wednesday, July 9, 1980 Mr. Hurle was discharged. At that time these proceedings were ongoing, the Board having conducted some 10 days of hearing. At the beginning of the hearing scheduled for July 11, 1980 counsel for the union indicated that a section 79 complaint had been filed, alleging that Mr. Hurle had been discharged contrary to *The Labour Relations Act*. Counsel for the employer argued that the Board should not hear a section 79 complaint as part of these proceedings, nor at all, because Mr. Hurle had been immediately reinstated and had been compensated for the one day which he had lost as a result of his termination. On that basis K-Mart maintained that the section 79 complaint was entirely academic and should not be made a part of these proceedings. In the alternative counsel for the employer argued that he was not prepared to meet the case which the union was about to adduce that day in respect of these allegations. The day previous counsel for the union had presented his final argument on the section 7a application. In those circumstances the respondent maintained that the admission of a further complaint at this late hour would take it by surprise and would constitute an unwarranted extension of the section 7a proceedings.

46. The Board did not agree. One of the very issues before the Board is the question of whether employees in the Peterborough store of K-Mart are capable of voluntarily expressing their choice about trade union representation. Since the determination obviously requires an assessment of the present state of mind of employees the Board was not inclined to prevent the union from adducing evidence which it maintained would have a clear bearing on that issue. The fact that the respondent might discharge an employee because he is a vocal union supporter as much as six months after the events described above, and indeed during the course of the Board's certification proceedings, could, notwithstanding his immediate reinstatement, make an impression on other employees affecting their ability to opt freely for

union representation. (*Lorain Products* [1977] OLRB Rep. Sept. 734). The Board therefore ruled that the union could bring evidence with respect to the section 79 complaint relating to the discharge of Mr. Hurle, thereby consolidating these two matters. In fairness to the respondent, however, the Board adjourned the proceedings to allow the respondent the opportunity to prepare to meet the union's case.

47. While the Board heard extensive evidence with respect to the hiring, employment and discharge of Mr. Hurle, the thrust of that testimony can be briefly stated for the purposes of this application. Mr. Hurle was hired to perform the function of a store detective. It was his job, for approximately 24 hours a week, to detect and apprehend shoplifters in the store. Dressed in such a way as to look like a customer, Mr. Hurle spent his time watching both customers and staff in the store, whether through direct observation on the floor or by way of one-way mirrors and peepholes located as strategic places on the premises. In this work Mr. Hurle was under the direction of Douglas Evan Armstrong, the manager of security at the Peterborough store.

48. Mr. Armstrong gave Mr. Hurle, who had no previous experience, some orientation in the work of a floorwalker. In his first week of employment Mr. Hurle apprehended two youths in an attempt to switch prices on merchandise. As a result one of them was criminally charged.

49. On June 26, 1980 Hurle had a conversation with Mr. Armstrong. He related to him that he had had a date with a female employee who had told him of the union's efforts in the store. Hurle related to Armstrong that if the store knew about his own feelings and sympathies towards unions it would fire him. That same day, almost immediately after their conversation, Mr. Armstrong arranged to have coffee with Mr. Gilchrist. He then told the store manager of his conversation with Hurle. Mr. Armstrong related to Mr. Gilchrist that Hurle had expressed pro-union sympathies and that he had told him the name of an employee involved in supporting the union. Armstrong passed that employee's name on to Mr. Gilchrist. Under cross-examination Mr. Armstrong testified that he thought that it was his responsibility to let Mr. Gilchrist know the identity of the employee whom Mr. Hurle had disclosed as having an interest in the union.

50. The evidence of Mr. Gilchrist is even more telling on this point. In his testimony in chief about the conversation between himself and Armstrong, Mr. Gilchrist admitted that it was he who asked Armstrong whether Hurle had mentioned the name of the employee who was involved in the union organizing campaign. That came as a disquieting admission from Mr. Gilchrist who had previously, over the course of a day and a half of testimony before the Board, repeatedly made statements under oath in an attempt to leave the Board with the impression that he was not aware of who the union organizers were and that he was not actively attempting to find out.

51. The evidence establishes that Mr. Hurle also had a conversation with Mr. Gilchrist in which Hurle clearly indicated that he felt that the union had good cause in attempting to help the store's employees. In that conversation, which took place in the store cafeteria, Mr. Hurle openly stated to Mr. Gilchrist that he believed that the employees wages were inadequate and that their working conditions should be improved.

52. On Wednesday, July 9, 1980 Mr. Hurle had yet another conversation with a



member of management about the union. He approached Mr. Jack Drysdale, the manager of the men's wear department. He told Drysdale that a friend of his employed at General Motors had received a leaflet from the United Auto Workers instructing members not to purchase clothing at K-Mart. The unchallenged evidence is that Mr. Drysdale reacted with extreme anger to that statement. The manager stated forcefully that the company did not want a union and that the union was the idea of "a handful of employees who don't know what is going on".

53. Within an hour and a half of that conversation Mr. Hurle was summoned to the office of Mrs. Osborne, the personnel manager, and was told that his services were no longer required. At that time Mrs. Osborne did not indicate to the grievor that his work had not been satisfactory. She simply stated that sales were down and that he would not be needed.

54. At the hearing the company sought to establish that Mr. Hurle had not been a satisfactory employee and that poor work performance was the reason for his discharge. The evidence, however, does not support that assertion. At the time of his discharge Mr. Hurle had been in the store for barely eighteen working days, and then only on a part-time basis. During that period he had apprehended three shoplifters, two of whom were subsequently charged. He received the occasional comment of encouragement or direction from Mr. Armstrong. While he was once told not to smoke in Mr. Armstrong's office, he was never told that his work was unsatisfactory nor warned that his job was in jeopardy because of his work performance. The Board finds that the allegations that Mr. Hurle's work performance was unsatisfactory and the further suggestion that he spent too much working time socializing with staff, a criticism that was never communicated to him before his discharge, are transparent excuses for the deliberate discharge of an employee who was showing himself to be repeatedly outspoken on the question of the unionization of the store's employees. The discharge of Mr. Hurle is best understood as another instance of the respondent's determination to discourage any talk or activity that could advance the cause of the union. Having regard to the quality of Mr. Gilchrist's evidence the Board can place no reliance whatever on his denials that Hurle was discharged because of his union sympathy. The fact that Mr. Hurle was reinstated almost immediately, on the advice of counsel, does little to blunt the impact that his discharge would have on any reasonable employee.

55. There are three other aspects of the case which were the subject of substantial evidence and representations by the parties. The Board is satisfied that these further elements do not materially alter the merits of the case and therefore touches on them only briefly. The first is the allegation of the union that the employer attempted to use electronic eavesdropping devices to spy on the union's organizing campaign. The second is that the union threatened an unlawful strike, and the third relates to the ejection from the store of two union representatives.

56. We deal firstly with the allegation of electronic surveillance. Mr. Craig Herman, a former automotive service manager at the K-Mart store in Peterborough, testified that an employee in the furniture department approached him in November of 1979, during his employment, and told him that the employees in the automotive department were being watched and that a listening device had been planted to overhear their conversations. In the first week of November Mr. Herman noticed that a hole had been cut through the wall that separated the automotive department from a storage area known as the furniture loft. The hole, ostensibly an air vent, was positioned in such a way as to allow a person standing in the furniture loft to observe the activities of employees in the automotive department. Shortly

thereafter Mr Herman went to the furniture loft where he discovered an electronic device, commonly referred to as an "Andy Gibb microphone", lying on some shelving beneath the newly cut ventilation hole.

57. The evidence of Mr. Armstrong, which the Board accepts, establishes that in late October he obtained permission to open the ventilation hole to watch the automotive shop in an effort to solve a series of thefts involving a suspected employee. The hole was cut open for that purpose and as a result, on November 24, 1980, an employee in the automotive department was discharged after being apprehended in the course of stealing goods from the store.

58. The unrebutted evidence of Mr. William McCarthy Sandiford, a professional expert in the field of electronic surveillance, establishes that the "Andy Gibb microphone" found by Mr. Herman could not, because of its technical limitations, have been used in the way alleged by the union. The Andy Gibb microphone is a child's toy. It is designed to transmit the voice of a speaker from the microphone into a nearby FM radio receiver which can then broadcast the speaker's voice. Mr. Sandiford's uncontradicted testimony establishes that the Andy Gibb microphone is allowed by law to be sold commercially as a toy specifically because it cannot transmit beyond approximately one hundred feet. As listening devices go it is extremely crude. In the conditions described by Mr. Herman, Mr. Sandiford testified that the Andy Gibb microphone could not pick up sounds much beyond a range of eight to ten feet. Given its placement some eighteen to twenty feet above the floor of the automotive department, the size of that department and the normal noise level within it, the Board must accept the conclusion of Mr. Sandiford that the toy microphone which Mr. Herman says that he found would have been totally ineffective as a listening device.

59. A possibility touched on by counsel for the union is that quite apart from its ineffectiveness, the microphone could have been placed where it was found and deliberately brought to the attention of the employees by the employer, to foster the impression among them that they were being listened to. This Board would have no difficulty concluding that an employer deliberately creating the impression of surveillance of union activity would be engaging in the unlawful interference with the rights of employees, contrary to the Act. (cf. *Delchamps Inc. v. NLRB* 99 L.R.R.M. 3386 (C.A. 5 (1978)); *NLRB v. Redwing Carriers, Inc.* 100 L.R.R.M. 2492 (C.A. 1 (1978))). On the strength of the evidence before the Board, however, that is a speculative theory at best. On the evidence before us we cannot conclude that K-Mart was responsible for the placement of the microphone as alleged by Mr. Herman or that it deliberately sought to create the impression that it was eavesdropping by means of an electronic listening device.

60. Through cross-examination of Phyllis Marier, the union's organizer, counsel for the respondent sought to establish that in a telephone call to the store's co-manager Mr. Thomas on November 12, 1980 her superior, Mr. J.H. Nicholls, threatened an illegal strike at the store. That allegation was denied by Mrs. Marier. Since Mr. Thomas was not called to testify the Board can not take it as established, other than by unreliable hearsay through Mr. Gilchrist, that such a threat was made by Mr. Nicholls. Assuming, without finding, that the union organizer did threaten an unlawful strike, that conduct might be grounds for a complaint to this Board, but it could not justify or excuse the employer's recourse to self help by

massive unfair labour practices designed to deter the employees from associating with the union.

61. The day after the telephone conversation between Nicholls and Thomas, Mr. Nicholls and Mrs. Marier entered the respondent's store and began to distribute pro-union pamphlets. Mr. Gilchrist then confronted Mr. Nicholls and told him to stop distributing the pamphlets, telling him that, if necessary, he would call the police to have him removed from the store. Mr. Gilchrist then turned and walked to the service desk and telephoned the police while Mr. Nicholls and Mrs. Marier continued to distribute pamphlets for a short time before leaving the store.

62. The right of an employer to impose limitations on the ability of employees and non-employees to engage in union organizing while on its premises, whether in or out of working areas or working time, has been the source of much litigation. (See, generally, *Babcock and Wilcox* 351 U.S. 105 (1956); *Montgomery Ward and Co.* 157 F. (2d) 486 (C.A. 8, 1946); *Associated Medicine Services Inc.* 64 CLLC ¶16,303; *Jim Pattison Industries Ltd. (Courtesy Chevrolet)* [1979] 2 Can. LBR 517 (BCLRB); *Consolidated Fastfrate Limited*, [1979] OLRB Rep. Apr. 418; *Skyline Hotels Limited*, [1980] OLRB Rep. Dec. 1811; and with respect to retail stores see, *May Department Stores Co.* 17 LRRM 985 (C.A. 8, 1946); *Marshall Field v. NLRB* 31 LRRM 2073 (C.A. 7, 1952); *Walgreen Co.* 91 LRRM 1177 (N.L.R.B. 1976) and see also Murray, *No-Solicitation and No-Distribution Rules: Presumptive Validity and Discrimination*, 112 U.Pa. L. Rev. 1049 (1964)).

63. In this case counsel for the union did not rest his request for certification under section 7a in any substantial part on the basis that union organizers were wrongfully excluded from the retail store premises by the employer. Given the overwhelming evidence of unfair labour practices reviewed above, the Board does not, in light of its decision on the merits elaborated below, deem it necessary to further discuss this aspect of the case. Any comment by this Board on the right of employers, and in particular of employers in the business of retail trade with the public, to prohibit access to their premises for the purpose of soliciting union membership should await an application or complaint where such conduct is more central to the case and where the merits of that issue are more fully argued.

64. The Board therefore turns to consider whether the three elements giving rise to the application of section 7a of the Act have been satisfied so as to cause the Board to grant certification to the applicant union. Has the employer breached the Act? Has it done so in such a way as to prevent the employees from voluntarily expressing their wishes as to union representation? If so, does the union have sufficient membership support for the purposes of collective bargaining?

65. The evidence establishes an extensive and continuing pattern of unfair labour practices by K-Mart. They must be viewed together in assessing their impact upon the employees. First, the employer engaged in overt surveillance by following two employees in an obvious attempt to discourage them and other employees from associating with the trade union. This evidence, which establishes a violation of section 58 of the Act, causes the Board particular concern given the impact surveillance may have in discouraging union activity. The general chilling effect of surveillance of union activity is more fully discussed below. Secondly, the speeches of Mr. Gilchrist in some 25 employee meetings coupled with the almost continuous conversations of Mrs. Fox with employees throughout the store over a three week period



clearly establish that the employer took unfair advantage of its position of control and authority to bring intimidation and undue influence to bear on its employees contrary to section 56 of *The Labour Relations Act*. Thirdly, the written letter of discipline to employees the same day that they first appeared to testify before this Board on behalf of the union, particularly where their employer had previously known of their activity for over two months without giving them any disciplinary warning whatever, amounts to a deliberate attempt to obstruct witnesses from giving evidence before the Board, contrary to section 71 of *The Labour Relations Act*. Lastly, the discharge of Mr. Hurle, an employee who had wide contact with the staff of the store, both at work and socially, and whose pro-union leanings were not hidden, was in breach of section 58 of *The Labour Relations Act*. The significance of this discharge would not be lost on employees, notwithstanding the effort of the company, on the advice of counsel, to reinstate Mr. Hurle the next day.

66. The Board has expressed itself in a number of cases on the kind of unfair labour practice that can trigger the application of section 7a and result in the discretionary granting of a certificate: (See *Dylex Ltd.* [1977] OLRB Rep. June 357; *Viceroy Construction Co. Ltd.* [1977] OLRB Rep. Sept. 562; *Lorain Products (Canada) Ltd.* [1977] OLRB Rep. Nov. 734; *Radio Shack* [1979] OLRB Rep. Mar. 248). In this case the Board must first consider the impact of the open and continuous surveillance of two employees who were the spearhead of the union organizing campaign. Spying on employees is not new to the catalogue of unfair labour practices resorted to by employers who are extreme in their determination to stop their employees from exercising their collective bargaining rights. This Board has previously found instances of covert surveillance to be unlawful interference with the rights of employees under the Act; (see, for example, *Radio Shack*, [1979] OLRB Rep. Mar. 248). In its very first reported decision the National Labour Relations Board was confronted with the tactic of surveillance as a method of discouraging union activity. From that time to the present, with the endorsement of the Courts, the NLRB has consistently found surveillance or the attempt to create the impression of surveillance of union activity to be unlawful interference with the rights of union association expressly protected by law; (see, *Pennsylvania Greyhound Lines Inc.* 1 NLRB 1 (1935) at p. 22; *A & R. Transport Inc. v. N.L.R.B.* 101 LRRN 2856 (C.A.7, 1979) and the *Delchamps* and *Redwing* cases, *supra*).

67. Surveillance can have a legitimate application in the work place. An employer may, for example, have to use one form or another of surveillance to protect its property against theft and vandalism or to monitor machinery and processes to ensure the safety of employees. In Ontario, however, an employer may not use surveillance to intimidate employees from exercising their rights under *The Labour Relations Act*.

68. The evidence in the instant case establishes that K-Mart deliberately subjected two ladies who were among leaders to an open and demeaning form of surveillance. Its actions in this regard are disturbing whether they are viewed in light of *The Labour Relations Act* or from the simple standpoint of human dignity. Conduct so extreme as to include an employee being escorted to the washroom by her supervisor, in the plain view of other employees, because of her wish to be represented by a union constitutes an abuse of employees that will not be countenanced in this Province.

69. We should stress that in view of the apparent scope and method of K-Mart's reaction to the union we are not quick to view this conduct as the paternalistic blundering of an unsophisticated employer. In the circumstances of this case the Board concludes from the fact

that the surveillance was carried on so openly that it was intended not only to confine the actions of the two union leaders but also to be observed by other employees in an effort to turn them away from the union out of fear that support for the union could result in their being followed. The use of surveillance as a tool to chill free expression and control dissent is well documented. Where an activity, albeit lawful, and its participants are made the object of “official” surveillance there tends to be a chilling effect on the ability to both those being surveyed and those who are aware of the surveillance, to express themselves freely in support of the activity being watched. This process, referred to in literature on the subject as the “chilling effect” of surveillance, has become a recognized technique of behaviour modification.

70. Individuals who are aware of surveillance being conducted by authorities against a legitimate activity may come to redefine the activity as being somehow illegitimate and tend to avoid any association with it. Alternatively, even if an individual who is aware that another is under surveillance does not develop a personal antipathy to that person’s activity, he may nevertheless dissociate himself from the victim of surveillance if only to avoid the stigmatization that tends to attach to anyone who is knowingly being investigated. In one of the earliest studies on contemporary surveillance the authors drew the following conclusion:

[t]he hazards of *being* investigated – even if one is subsequently cleared – are so great that individuals are induced to limit their behaviour by avoiding (or trying to avoid) anything that might conceivably arouse anyone’s suspicion and thus lead to charges and an investigation. (Johoda and Cook, *Security Measures and Freedom of Thought*, 61 Yale L.J. 296 -333 (1952)).

71. In the instant case the fact that surveillance of O’Connor and Clark was restricted to the store’s premises would not necessarily limit the impact of surveillance to that location. The fear of surveillance can have a spill-over effect into union meetings and private encounters off the employer’s premises. Employees who know that surveillance is being conducted at the work place can never be certain that it is not going on elsewhere. Askin, in *Surveillance: The Social Science Perspective* (4 Columbia Human Rights Law Review 59 (1972) at p. 73) relates the following observation from a study made by a team of social and behavioural scientists:

Actual surveillance of an individual or group or of a particular event, political or otherwise, is not an essential element for chill to occur. With public knowledge that surveillance . . . has occurred and is continuing to occur, the individual’s perception of the actual event has been influenced. Based on the expectation that surveillance might be going on, people exhibit the same verbal inhibitions as if they were certain through direct knowledge that a surveillance agent were present.

72. In this case the Board further concludes that a kind of surveillance was being carried on by management through the system of employer meetings that were held with employees and the simultaneous activity of Mrs. Fox. The evidence establishes that there was nothing random about the employee meetings. Mr. Gilchrist testified that under his instructions Mrs. Osborne, the personnel manager of the store, prepared lists of ten to fifteen employees on separate cards. As each of the five employer speeches were delivered the same group of employees were assembled in a small room where they were observed by Mrs. Osborne and

Mrs. Fox, as well as by Mr. Gilchrist who delivered the speeches. That kind of assembly, encouraging as it did the opponents of the union to speak out, would have the natural consequence of stripping away the feeling of anonymity that union supporters might previously have enjoyed. Any normal employee in those circumstances could reasonably suspect that he or she was being brought into meetings of the same small group as much to be observed as to be informed yet again of the employer's position on unions.

73. That suspicion could only be reinforced by the subsequent exposure of employees to one on one conversations with Mrs. Fox, the second highest ranking personnel administrator of the company in Canada. As Mr. Gilchrist eventually admitted in his evidence, the company did attempt to establish a list of which employees were sympathetic to the union and which were opposed, ostensibly to gauge the numerical strength of the union. In the unusual circumstances then prevailing in the store it would not have been unreasonable for an employee to suspect that the company was watching closely to identify union sympathizers. Under that unseen pressure it would be natural for an uncommitted employee to sense that he was being evaluated and to see his conversation with Mrs. Fox as an opportunity, in the interest of job security, to align himself on the anti-union side.

74. Exposing individuals, both in small group meetings and in individual conversations, to situations where they feel that they are being evaluated can have a substantial impact on both their behaviour and their beliefs. Referring to this reaction as "evaluation apprehension", the study reprinted in Askin, *supra*, comments:

This apprehension is an active anxiety that subjects feel when they are being evaluated. It leads the individuals to behave in a manner that will win a positive evaluation from the person who is judging him.

...

The psychological consequence of concern over social evaluation (induced through awareness that one's behaviour is under surveillance) is the arousal of anxiety. This anxiety raises the threshold for expression of all behaviours which could be judged as non-normative, deviant, atypical, or politically dissident. The overt consequences of such an internal state of "evaluation apprehension" are:

- (1) a likely avoidance of such evaluative situations;
- (2) a limitation or modification of the public speech or actions of the individual who is in such situations, so as to render the speech or action "acceptable" to the sponsors of the surveillance; and
- (3) an arousal of feelings of shame and worthlessness by the individual who avoids such situations, if he is committed to those beliefs relevant to the situation. If he is not yet committed to the belief, he is likely to come to view those beliefs as illegitimate, as a direct consequence of the surveillance.



(see also generally, Rosenberg, *The Conditions and Consequences of Evaluation Appreciation in Artifact In Behavioural Research* 279-349 (R. Rosenthal and R. Rosnow eds. (1969); A Bandura, *Principles of Behaviour Modification* (1969); W. Gellhorn, *Security, Loyalty and Science* (1950)).

75. The chilling effect of an unfair labour practice is never susceptible of precise measurement. In the instant case the Board cannot purport to say with any precision the number of employees who became alienated from the union because of the sophisticated anti-union campaign of their employer. The Board is satisfied, however, on the basis of the evidence before it, that the open surveillance of the union organizers, the subjection of employees to repeated small meetings and their continued exposure to the scrutiny of Mrs. Fox, would reasonably have caused numbers of employees who might otherwise have supported the union to refrain from doing so. No doubt there were employees in the Peterborough store who, like the objectors who appeared before us, opposed the union voluntarily and would have done so without any prompting from their employer. The preponderance of the evidence, however, points to the conclusion that K-Mart deprived the employees of the Peterborough store as a whole of the ability to chose freely, in an atmosphere untainted by employer undue influence, with respect to whether they wish to be represented by a trade union. The evidence establishes that in seven days of campaigning before November 8th, the day the store manager became aware of the union, thirty-one employees had signed union membership cards. After that day, through the period of the speeches and surveillance, only three employees joined the union.

76. Counsel for the respondent argues that in fact the union campaign had run its course and had come to an unsuccessful end at the same time, coincidentally, as the employer's campaign began. That argument, however, is plainly inconsistent with the employer's own judgment of the campaign at the time. By conducting an intense and highly organized anti-union campaign that extended over three weeks, ending only when the application for certification was filed, K-Mart gave every indication that in confronting the union it believed itself to be dealing with anything but a spent force. If the employer had not interfered with the employees, and their acceptance or refusal of the union membership had been tested in circumstances more conducive to a voluntary choice, the Board might be in a position to assess the respondent's argument that the union had already obtained all of the support that it was going to get when the unfair labour practices began. However, when the employer's very conduct has made that a virtually unanswerable question the Board is not inclined to give the employer the benefit of the doubt on that issue. Skepticism naturally attaches to the defence that the murder victim died of a heart attack seconds before the bullet struck him.

77. On the evidence before it the Board must conclude that the employer's conduct achieved its intended consequence, namely to deprive the employees of the ability to freely opt for union representation. We have no doubt that the anti-union campaign in November of 1979, reinforced by both the intimidation of witnesses before the Board in February, 1980 and the discharge of an outspoken union sympathizer in July of 1980, deprived and continues to deprive the employees of the K-Mart store in Peterborough of the ability to freely express their wishes respecting union representation. The Board cannot accept the argument of counsel for K-Mart, ostensibly based upon the study done by Getman, Goldberg and Herman, *Union Representation Elections: Law and Reality* (New York, 1976) that employees with a predilection to union sympathy will support a union while employees with an anti-union orientation will oppose a union and that their choices in that respect are essentially uninfluenced by

employer unfair labour practices. As the authors of that study acknowledge at page 70, there is a substantial body of employees whose predispositions do not dictate the way they will vote on the question of union representation (cf. Shapiro, *Why do Voters Vote?* 86 Yale L.J. 1532 at 1536-37). Moreover, the authors do not question the practical validity of a labour board granting certification in the absence of a demonstrated majority when the employer has engaged in egregious conduct in its campaign of opposition to the union. While there may be different standards of what is and is not egregious, we have a little difficulty in concluding that the overbearing tactics of K-Mart established in this case fall within that category.

78. The final issue in respect of the application of section 7a of the Act is whether the applicant has sufficient employee support for the purposes of collective bargaining. An issue preliminary to that question is the determination of the bargaining unit. The union and the respondent are disagreed as to its composition. The union takes the position that some eleven individuals including two door-greeters, one check-out supervisor, three clerical employees in the merchandising office, one advertising co-ordinator, three employees in the clerical staff of the general office and one person employed clerically in the cash office should be excluded from the bargaining unit either by virtue of their exercise of managerial functions or because they exercise responsibilities that are confidential in relation to labour relations within the meaning of section 1(3)(b) of the Act. Alternatively, the union submits that all office employees should be excluded from the bargaining unit because they have a separate community of interest.

79. Having regard to the agreed statement of facts submitted by the parties in respect of the disputed individuals, and to the evidence heard directly by the Board, we are satisfied that none of the aforementioned individuals exercises managerial or confidential duties within the meaning of section 1(3)(b) of the Act. The Board is likewise not satisfied that in the circumstances of a discount store such as the respondent's the relatively small group of office staff should be excluded from a bargaining unit that would encompass all other employees, a group which already includes persons involved in sales and persons not involved in sales. The evidence establishes that the office employees are functionally integrated with the sales and stock room employees in their everyday functions. There is also an interchange between the sales floor and the office, some office employees having previously worked as sales clerks. From the standpoint of community of interest the office employees have at least as much in common with the sales and stock room employees as for example, the mechanics who work in the automotive service department, a group that the union would, without objection from the respondent, include in the bargaining unit. In these circumstances the Board is satisfied that the more comprehensive unit is in this case the more rational and viable delineation of employees for the purposes of collective bargaining. Having regard to these conclusions as well as to the agreement of the parties that the pharmacist should be excluded, the Board finds that all employees of the respondent employed at its K-Mart store in the City of Peterborough, save and except department managers, persons above the rank of department manager, management trainees, pharmacist, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for the purpose of collective bargaining.

80. On the date of application there were eighty-five employees in the bargaining unit. The applicant has filed membership applications for thirty-four of those employees. It therefore has a membership strength of forty per cent as of that date. There being no evidence to the contrary, the union must be deemed to retain that strength at the present time. In *Victory Construction Co.*, (*supra*) at p. 567-68, granting certification under section 7a where member-

ship strength of forty per cent was established, the Board made the following comment about the degree of employee support required for the purposes of section 7a of the Act:

Membership support that is adequate within the meaning of section 7a does not necessarily mean majority support. That section was obviously intended to apply where an application for certification is made by way of a pre-hearing vote. In that situation no more than 35% of the employees in the proposed bargaining unit need be members in order for the Board to order a vote. Momentum can be important in an organizing drive and a trade union might decide to cut off its membership card campaign at or slightly above that threshold in order to obtain the benefit of an early vote rather than seek outright certification. We are satisfied that the Legislature did not intend that a trade union and employees in that circumstance should be any less entitled to the protection of section 7a where the three criteria set out in that section are met.

That is not to say however that membership strength of 35% must automatically be seen as adequate membership support. No arbitrary percentage can be arrived at that will apply in all cases. The Act requires the Board to determine what is adequate membership support by the light of its own opinion depending on the facts of each case. In forming its opinion in any case the Board must have regard to all of the surrounding circumstances. Relevant factors include whether the employer's contravention of the Act occurred early or late in an organizing campaign, the nature and gravity of the contravention itself and the relative strength and influence of the employee members on other employees within the bargaining unit.

81. In approaching its discretion to grant certification under section 7a of the Act the Board must make some prognosis as to the future viability of bargaining. In so doing it does not necessarily view the membership strength which the applicant has on the date of certification as a static and immutable figure. Where the evidence establishes that a work place has been subjected to the chilling effect of unfair labour practices that tend to suppress any expression of pro-union sentiment, it is not unreasonable to expect that the granting of a Board certificate, with or without the assistance of other remedies under *The Labour Relations Act*, will in some degree restore the legitimacy of the trade union in the eyes of the employees. The Board therefore takes into account the potential for union support to grow among employees who beforehand might have been afraid to associate themselves with the union. With the granting of a certificate, assuming that all unfair labour practices will end, there is little reason to doubt that the union's base of support will grow and that more and more employees will come forward to participate in the endeavours of their bargaining agent.

82. In determining whether a union has support adequate for collective bargaining purposes within the meaning of section 7a of the Act the Board's concern is whether there is a number of employees, sufficiently representative of the employees in the bargaining unit, with the ability to negotiate with their employer on the content of a collective agreement. In this regard bargaining ability is to be distinguished from bargaining power. The question is not whether they can mount a successful strike, or whether they will eventually realize substantial gains at the bargaining table. Rather, it is whether they have the core of support sufficient to



negotiate with the employer. A section 7a certificate, like any certificate, is only a beginning and need not be seen as anything more.

83. In the instant case the employer struck early and struck hard at the union's campaign. Notwithstanding the force of its unfair labour practices the union has shown itself to have a substantial core of support and determined leadership in the employee ranks. In these circumstances, we are satisfied that the applicant union has membership strength sufficient for the purposes of collective bargaining within the meaning of section 7a of *The Labour Relations Act* and that it should be certified.

84. In the light of the extreme conduct of the employer in this case, the Board is further of the view that it should exercise its remedial jurisdiction under section 79 of the Act to establish conditions that will promote fuller employee participation with a view to producing more constructive bargaining between the employees and their employer. In the circumstances of this case the granting of a certificate will not, of itself, undo the public indignity that the two employees who championed the union were subjected to by their employer. The granting of a certificate will not of itself erase the impression conveyed over some 25 meetings with employees that the union is disreputable and has no place among the employees of K-Mart. The granting of a certificate will not remove from the minds of employees the memory of the searching and questioning presence of Mrs. Fox. Nor will the granting of a certificate remove from the minds of the employees the belief, pushed upon them so forcefully by their employer, that membership in a union and good service to an employer are somehow incompatible. When those messages have been made to permeate a work place by pervasive unfair labour practices, as they have in the instant case, the Board will not hesitate to provide relief adequate to redress the imbalance. To fail to do so would risk consigning the section 7a certificate to a climate where a collective agreement will be difficult, if not impossible, to realize. In this case, therefore, through its remedial authority the Board seeks to restore the union and the employees who support it to the legitimacy that their lawful activity was intended to have.

85. In light of the imbalance created by the respondent's conduct a comprehensive remedial order is required. In determining the content of the order, the first consideration is the means to redress the employer's violation of the Act in publicly inflicting indignity and harassment on the two employees chiefly responsible for the union. As the Board has noted, Miss Kelly O'Connor and Mrs. Beverley Clark were stigmatized and ostracized by their employer's deliberate plan to discredit them and their beliefs in the eyes of the other employees. This is not a situation where they can easily be put back in the position they would have been in if the employer had not engaged in unlawful conduct. If, for example, they had been discharged, they would be readily compensated and restored by an order of reinstatement without loss of wages or benefits. It is somewhat more difficult to make them whole for this violation of the Act. That is no reason, however, not to try.

86. The open surveillance of the two employees leading the union campaign was central in the employer's strategy to drive the union out. It had an impact at three levels, touching as it did the employees being watched, their fellow employees and the union itself. What remedies, then, will protect these individuals and redress the wrong that was done?

87. A declaratory finding that K-Mart has breached the Act coupled with an order that it cease and desist from the surveillance and harassment of these two employees in the future will not restore them to where they would have been if the Act had not been breached. They

should have been able to pursue their union campaign freely and without interference, whether or not the union should ultimately succeed in being certified. The Act protects employees individually as well as unions. The granting of a certificate to the union under section 7a of the Act should not, therefore, be construed as a remedy for the infringement of their individual rights. A declaration and a cease and desist order from the Board are clearly appropriate to protect them from any future recurrence of such conduct. But that will not compensate them for the abuses that they endured for some three weeks, nor for the longer period of their ostracism.

88. The Board has considered whether ordering a personal written apology from the employer to these two employees would redress the harm that has been done. In the normal case that form of redress would go a long way to repairing the wrong done. It would be a convincing form of reparation where, for example, the Act was violated by the unauthorized excesses of a single supervisor. In those circumstances an apology from higher management could be a credible and acceptable measure of redress. It might even be sufficient where the surveillance and harassment of employees had been a deliberate but misguided employer decision where the employer's overall conduct has not been such as to undermine the credibility of a subsequent apology.

89. Unfortunately those conditions do not obtain in this case. The evidence before the Board is that the employer has been too easily given to the facile use of apologies in the past. Early in the proceedings when it came to the Board's attention that witnesses had been intimidated by letters of discipline the respondent promptly issued a letter of apology and sought to convince the Board that the matter was now a non-issue. Still later in the proceedings, when it was alleged, as we have found, that an employee was discharged for his union sympathies, we were urged to ignore the matter because he had been reinstated immediately on the instructions of the respondent's counsel. Against that background, and in the extreme circumstances of this case, we are forced, reluctantly, to conclude that the employees concerned could too readily, and with some justification, view an apology from K-Mart by Board order as a meaningless gesture. While in another case ordering an apology might be an appropriate Board response, in this case the conduct of the respondent has been such that an apology would have little, if any, remedial value.

90. We are satisfied that to remedy the impact of the pervasive unfair labour practice of the employer, including the effect on other employees of surveillance of Clark and O'Connor, the numerous speeches of the store manager to employees isolated in small groups, the repeated exposure of employees to individual conversations with Mrs. Fox, the intimidation of Board witnesses and the discharge of an employee, the Board's order should include the posting in the work place of a statement by K-Mart that it has been found to have violated the Act and that it will in the future refrain from such conduct. The Board must closely consider whether such a notice will redress breaches of the Act suffered personally by Clark and O'Connor.

91. The posting order, first introduced by this Board in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, is a remedy generally intended to be supplementary to the remedies granted to individual employees. In an analysis of the purpose of the posting order, the Board noted in *Valdi Inc.* [1980] OLRB Rep. Aug. 1254 at 1267-70, that the reinstatement with compensation of an individual who was discharged for union activity will not necessarily, of itself, undo the

chilling effect on other employees of the unfair labour practice. As the Board commented (at pp. 1269-70):

... the impact of unfair labour practices are seldom confined to an economic impact. For example, the isolated dismissal of an employee in the midst of or at the outset of an organizing campaign is likely to have a significant "chilling effect" on other employees who witness the incident and understand its origin. The dismissal of a fellow employee for union activity conveys a strong warning to other employees and can bring a stop to an ongoing drive in its tracks. The mere reinstatement of the employee directly affected, with backpay some time later, may do little to assure his or her fellow employees that the employer is prepared to live within the requirements of the statute and that effective remedies exist for those occasions where he will not... One of the unique remedies developed by labour relations agencies to respond to the psychological impact of unfair labour practices requires the offender, whether employer or union, to communicate to employees affected by an unfair labour practice that it has been found guilty of violating statutory labour laws and that it will henceforth conform to their requirements... Making employees aware of the meaningful rights is vital to the success of *The Labour Relations Act*. Admittedly, the effect of the posting requirement often will be difficult to evaluate but this is no reason for inaction. Surely, for example, the fear for job security will be lessened with the realization that someone more authoritative than the employer has voice in determining what he can do to those who support a trade union and that someone more powerful than a trade union will protect those who lawfully oppose it. Even a belated notice is better than none, if it helps to dispel any fears, confusion or ill-will created by a situation which has been equitably resolved.

92. In this case a posting order is manifestly appropriate to dispel the fear among the employees that we have found would be the natural consequence of their employer's unfair labour practices. It is appropriate to assure all of the employees that they need not fear any more surveillance, intimidation or discharges at the hands of their employer because of their association with the union. The posting order is designed to have restorative impact on the employees and the union as a whole. It may also, in some measure, undo some of the ostracism experienced by Kelly O'Connor and Beverley Clark and reassure them that they will not again be subjected to relentless, open surveillance at the hands of their employer. But while a posting order should bring security for the future, it will not compensate them for past events which, in the contemplation of the Act, they should not have experienced.

93. We therefore consider whether monetary damages are appropriate for that purpose. As the Board concluded in *The Journal Publishing Company of Ottawa Ltd.* [1977] OLRB Rep. June 309 at 323-24 and reiterated in *Radio Shack, supra*, at p. 1255, the language of section 79 of the Act confers upon the Board the power to award compensation in the form of general damages arising from a breach of the Act. That conclusion was confirmed by the Court in *Tandy Electronics Limited v. United Steelworkers of America*, 80 CLLC ¶14,017 (Ont. Div. Ct.) where at p. 12,093 the Court commented:



So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award of damages is novel, that the remedy is innovative, should not be a reason for finding it unreasonable.

94. In the instant case Miss O'Connor and Mrs. Clark were deliberately made to suffer extraordinary indignity as a means of destroying their freedom to associate with a trade union. The surveillance and harassment which they suffered should not be beyond redress merely because it involved no pecuniary loss to themselves. The interference with their rights under the Act by means of personal humiliation should, therefore, not be seen as beyond redress by some degree of monetary compensation.

95. Compensation for an unfair labour practice involving an assault on an employee's dignity must be assessed carefully, and will be awarded only in the most extraordinary of cases. There are numbers of instances where an employee who is the victim of an unfair labour practice may incidentally suffer a loss of dignity or self-esteem. An employee who is discharged for organizing a union may suffer emotional stress as a result of his unemployment. In that instance, however, it is the discharge itself that is the violation of *The Labour Relations Act*. The remedy should be tailored to the wrong. The breach of that employee's right not to be so discharged can be remedied by his reinstatement with full compensation for all wages and benefits lost.

96. Different considerations apply when, as in this case, a calculated offence to the dignity of the individual is the very means by which an unfair labour practice is achieved. If the Act is truly to provide protection from that kind of abuse and, for the reasons explored above, a declaration, a cease and desist order, a posting or apology will not be appropriate to redress the wrong done, a remedial order must include the possibility of monetary compensation. Where an employer has subjected employees to public indignity as a deliberate means of furthering its unlawful purpose and the Board concludes that no other remedy will adequately redress that particular unfair labour practice, it may deem it appropriate to order the compensation of the victimized employees to remedy the infringement of their rights under *The Labour Relations Act*. We are satisfied that this is such a case. The Board's remedy in this case, therefore, will include payment of compensation to Miss Kelly O'Connor and Mrs. Beverley Clark for the humiliation and harassment to which they were subjected by K-Mart of Canada Limited. An incidental effect of such compensation will also be to counter the impact of the surveillance on other employees. In terms that the employees can readily understand, the two employees concerned will be compensated and be seen to be compensated by this Board in a way that should enhance the effect of the Board's posting order. All of the employees should know that such abuses will not go uncorrected. While such compensation is not easy to quantify, and elaboration of the Board's principles in this regard should await the experience of further cases, we are satisfied that in the circumstances of this case the sum of \$500 to each of Miss O'Connor and Mrs. Clark is an appropriate amount of compensation.

97. To further correct the imbalance the Board's remedy will also include an order designed to insure the trade union access to the respondent's premises, during working hours, to speak to the employees in groups of like number as were addressed by the respondent's store manager, as well as the opportunity to attend any future meetings sponsored by the employer on the subject of the union, with equal time to respond. Further, the union will be given

reasonable access to employer bulletin boards on the store premises to communicate with the employees during the process of negotiations for a collective agreement. The Board's order will also insure that in the event Mr. Cuminskey, Mrs. Fox or any other officer or agent of the company attends at the store for the purposes of communicating with the employees with respect to collective bargaining that officers of the trade union be given adequate notice and a corresponding and simultaneous opportunity to do likewise.

98. Lastly, to redress the unfair labour practices of the employer and establish the conditions for collective bargaining in an atmosphere devoid of fear and suspicion the Board's order will include the posting of an undertaking by K-Mart that it will in the future refrain from surveillance, the interference with witnesses in Board proceedings, the discharge of employees or any other form of intimidation, coercion, or undue influence designed to interfere with the right of employees to join and participate in the lawful activities of a trade union.

99. In summary, and for the purposes of clarity, the Board finds that the respondent K-Mart of Canada Limited has:

- (1) violated sections 58 and 61 of the Act by the overt surveillance of Kelly O'Connor and Beverley Clark;
- (2) violated section 56 of the Act by intimidation and undue influence in both the form and content of the employee meetings addressed by Mr. Gilchrist;
- (3) violated section 56 of the Act by intimidation and undue influence in the conversations with employees and the extended presence of Mrs. Fox in the Peterborough store;
- (4) violated section 71 of the Act in the attempt to deter four employees from giving evidence in Board proceedings; and
- (5) violated section 58 of the Act by discharging Mr. Hurle because of his union sympathies.

The Board therefore orders that K-Mart Canada Limited:

- (1) cease and desist from surveillance of employees in its Peterborough store for the purpose of interfering with their rights under *The Labour Relations Act*;
- (2) cease and desist from intimidating or exerting undue influence upon employees whether through meetings, individual conversations or otherwise, to prevent employees from exercising their right to associate and participate in the lawful activities of a union;
- (3) cease and desist from disciplinary measures or any other conduct intended to intimidate employees from freely giving evidence in any proceeding under *The Labour Relations Act*;

- (4) cease and desist from the discharge or the threatened discharge of any employee because of that employee's union activity of sympathies;
- (5) pay forthwith the sum of \$500.00 each to Kelly O'Connor and Beverley Clark for the extraordinary harassment and indignity to which they were subjected;
- (6) provide the union forthwith with a list of the names and addresses of employees in the bargaining unit and keep the list updated from time to time for one year or until the union has entered into its first collective agreement with the respondent, whichever shall first occur;
- (7) permit the union access to the Peterborough store during working hours for the purpose of conducting three separate meetings, such meetings to be within six weeks of the date of this order or such further time as may be agreed by the parties, in groups of 10 to 15 employees in the ladies' lounge and out of the presence of any member of management.
- (8) permit representatives of the union access, with reasonable notice beforehand, to any meeting of employees sponsored by the employer which involves the discussion of collective bargaining, with equal time to be afforded the union representatives to respond, such access to be provided for one year, or until a collective agreement is concluded, whichever shall first occur;
- (9) give union representatives reasonable notice of any visit to the Peterborough store by Mrs. Fox or any other officer or agent of the respondent for the purpose of discussing employee relations with members of the bargaining unit and to allow such union representatives equal and simultaneous access to the employees as is permitted to Mrs. Fox or such other officer or agent of the respondent, such access to be provided for one year, or until such time as a collective agreement is concluded, whichever shall first occur;
- (10) provide the union for a period of one year from the date hereof, reasonable access to all employee notice boards in the Peterborough store for the posting of union notices, bulletins and other union business literature, to allow the employees ready access to information from the union concerning all aspects of the employees' representation including the negotiation of a collective agreement with their employer;
- (11) post copies of the attached notice marked 'Appendix' after it is signed by an appropriate officer of the respondent. The appendix is to be posted in conspicuous places on the store premises in Peterborough, where it will be reasonably accessible to all employees,



including all places where notices to employees are customarily posted. The notice shall be posted forthwith for a period of 60 consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable access to the premises shall be given by the respondent to two representatives of the union to satisfy itself that this posting requirement is being complied with.

100. A certificate will issue. The Board remains seized of this matter in the event of any disagreement respecting the interpretation or implementation of this decision.

#### **DECISION OF BOARD MEMBER J. D. BELL:**

1. I agree the company did commit certain unfair labour practices. However I do not wish to be associated with many of the objectives used, the obiter quoted, nor many of the inferences arrived at in the majority decision.
2. I further agree with the redress ordered except in two matters. First, I question the propriety of awarding \$500.00 each to Kelly O'Connor and Beverley Clark as damages. In my opinion such damages are punitive, not compensatory and therefore are not within the jurisdiction of the board, *Tandy Electronics Limited v. United Steelworkers of America*, 80 CLLC ¶14,017 (Ont. Div. Ct) ¶12,093. Secondly, I am unable to accept the majority's position of certifying the union under section 7a of the Act.
3. In a study prepared by the Ontario Ministry of Labour, 15 unions were granted certification under section 7a from the time of passage of the 1975 amendment until March 31, 1980. Of those, only 6 had negotiated a first collective agreement. However, during the same time period, there was a 75-80 per cent success rate in the negotiation of first collective agreements for certified units taken as a whole.
4. While this remedy may seem to be an effective way of dealing with employer unfair labour practices at the certification stage, it certainly appears that it will be far less effective at the collective bargaining stage unless the union has a strong core of support. Bargaining is, after all, a legitimate power struggle within the adversarial system of collective bargaining in Ontario.
5. Although the petition against the union was found by the majority to not be 'numerically relevant', the fact is that 101 employees did sign the petition (including a number of part-time employees). The majority at paragraph 43 found that "the ladies who sponsored the petition were genuinely and voluntarily opposed to the union... and that the Board is satisfied that the petitioners acted independently of their employer." This apparent solid front against the union makes the section 7a certification unreasonable in light of the 1980 amendment to *The Labour Relations Act*. Here the payment of union dues under section 36(a)(1) can compel employees, whether or not they are members of the union, to pay union dues.
6. It should be sufficient in this case to implement the orders detailed in paragraph 99 by the majority. To *also* certify the union under section 7a is a clear case of overkill. The union should *now* be given the opportunity to organize with conditions placed on the employer to prevent any further unfair labour practices.

7. Therefore, in light of the fact that the union has only 40% membership support, and 59% signed the petition in opposition to the union, a rational solution to this case would be to allow a continuation of the organizational campaign to see if the union can gain sufficient additional support to become the freely designated representative of the employees as contemplated by the Act.

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## Appendix

# The Labour Relations Act

# NOTICE TO EMPLOYEES

## Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT ENGAGE IN SURVEILLANCE OR HARASSMENT OF EMPLOYEES FOR THE PURPOSE OF INTERFERING WITH THEIR RIGHTS UNDER THE LABOUR RELATIONS ACT.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON EMPLOYEES, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT EMPLOYEES FROM EXERCISING THEIR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT INTIMIDATE EMPLOYEES FROM FREELY GIVING EVIDENCE IN ANY PROCEEDING UNDER THE LABOUR RELATIONS ACT.

WE WILL NOT DISCHARGE OR THREATEN TO DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

WE WILL PAY FORTHWITH THE SUM OF \$500.00 EACH IN COMPENSATION TO KELLY O'CONNOR AND BEVERLY CLARK AS ORDERED BY THE LABOUR RELATIONS BOARD.

WE WILL PROVIDE THE SERVICE EMPLOYEES INTERNATIONAL UNION FORTHWITH WITH A LIST OF THE NAMES AND ADDRESSES OF EMPLOYEES IN THE BARGAINING UNIT AND KEEP THE LIST UPDATED FROM TIME TO TIME AS ORDERED BY THE BOARD.



- 2 -

WE WILL PROVIDE REPRESENTATIVES OF THE SERVICE EMPLOYEES INTERNATIONAL UNION ACCESS TO THE STORE DURING WORKING HOURS FOR THE PURPOSE OF CONDUCTING THREE SEPARATE MEETINGS OF THE EMPLOYEES IN THE BARGAINING UNIT, IN GROUPS OF 10 TO 15, IN THE LADIES' LOUNGE AND OUT OF THE PRESENCE OF ANY MEMBER OF MANAGEMENT.

WE WILL PROVIDE REPRESENTATIVES OF THE SERVICE EMPLOYEES INTERNATIONAL UNION ACCESS, WITH REASONABLE NOTICE BEFOREHAND, TO ANY MEETING OF EMPLOYEES SPONSORED BY K-MART WHICH INVOLVES THE DISCUSSION OF COLLECTIVE BARGAINING, WITH EQUAL TIME TO BE AFFORDED THE UNION REPRESENTATIVES TO RESPOND.

WE WILL GIVE THE SERVICE EMPLOYEES INTERNATIONAL UNION REASONABLE NOTICE OF ANY VISIT TO THE PETERBOROUGH STORE BY MRS. FOX OR ANY OTHER OFFICER OR AGENT OF K-MART CANADA LIMITED FOR THE PURPOSE OF DISCUSSING EMPLOYEE RELATIONS WITH MEMBERS OF THE BARGAINING UNIT AND WILL ALLOW UNION REPRESENTATIVES EQUAL ACCESS TO THE EMPLOYEES AS IS PERMITTED TO MRS. FOX OR ANY OTHER REPRESENTATIVE OR AGENT OF K-MART.

WE WILL PROVIDE THE UNION, FOR A PERIOD OF ONE YEAR FROM THE DATE OF THE BOARD'S ORDER, REASONABLE ACCESS TO ALL EMPLOYEE NOTICE BOARDS TO POST UNION NOTICES, BULLETINS AND OTHER UNION BUSINESS LITERATURE TO THE ATTENTION OF THE EMPLOYEES.

K-MART OF CANADA LIMITED (PETERBOROUGH)

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PER: (AUTHORIZED REPRESENTATIVE)

DATED: JANUARY 26, 1981

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**

**2295-79-M International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Applicant, v. Master Insulation Company Limited, Respondent**

Construction Industry – Practice and Procedure – Section 112a – Province-wide bargaining provisions enacted during term of agreement – Whether Board having jurisdiction to hear grievance – Whether Board admitting evidence of events up to hearing date – Whether first provincial agreement must be for period of 2 years – Whether renewal notice given prior to commencement of 90 day period a nullity – Whether grievance timely – Whether subpoena a “fishing” expedition – Whether grievance lacking in particularity

**BEFORE:** N. B. Satterfield, Vice-Chairman, and Board Members W. Gibson and N. Wilson.

**APPEARANCES:** *B. Fishbein, M. Zigler, J. Duffy, and V. Churly for the applicant; G. J. Abols, W. G. Posthumus, Joe Bittenbinder and Paul Schuetze for the respondent.*

**DECISION OF THE BOARD;** January 15, 1981

1. The applicant International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (“Local 95”) has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 112a of *The Labour Relations Act*.

2. The grievance alleges that Master Insulation Company Limited (“Master”) has violated the collective agreement (“the Agreement”) between The Master Insulators’ Association of Ontario, Incorporated (“the Association”) and the International Association of Heat and Frost Insulators and Asbestos Workers (“the International”), and the International Association of Heat and Frost Insulators and Asbestos Workers, Local 95. The Agreement purports to have been signed June 5, 1979, to be effective from May 14, 1979 to April 30, 1980. Stated generally, the grievance alleges that Master has violated and continues to violate the Agreement from and after September 8, 1979 by:

- (a) failing or refusing to employ only members in good standing of the International and Local 95 to do its work covered by the Agreement and to hire them through the office of the International and Local 95, all as required by clauses 1.02 and 1.03 of the Article I – Recognition and Scope and clause 2.01 of Article II – Hiring of the Agreement; and further or in the alternative,

subletting or contracting out work covered by the Agreement contrary to the aforesaid clauses and to clause 8.01 of Article VIII – Performance of Work of the Agreement.

The grievance further alleges that, as a consequence of these alleged violations, Master has failed to pay the proper rates of pay, overtime, living allowances, travelling expenses, vacation pay and statutory holiday pay and has failed to report hours worked, make deductions and pay contributions in respect of union dues and various funds as required by the Agreement.

3. Master and Local 95 had been bound to the collective agreement between Local 95

and the Association which was signed November 29, 1975 to be effective from July 7, 1975 to April 30, 1979. This collective agreement was the predecessor of the Agreement and, pursuant to clause 1.04 of the collective agreement, was binding upon the employers and their employees and Local 95 and its members. Employers are defined in clause 1.01 as "... members and non-members of the Association set out in Schedule A." Schedule 'A' lists Master as an employer. The geographic scope of the collective agreement was the Province of Ontario except for certain counties in the eastern-most part of the Province. It covered work performed at construction sites and it included, but was not limited to, work performed in the industrial, commercial and institutional sector of the construction industry as referred to in section 106(e) of the Act. The parties are agreed that Master ceased, during the term of the collective agreement, to be a member of the Association although the evidence does not reveal when precisely this occurred.

4. During the term of the collective agreement, the "Province-Wide Bargaining" part of which the Act, which starts at section 125, was added to the Act as a result of *The Labour Relations Amendment Act, 1977*, S.O. 1977, c. 31, which introduced province-wide, multi-employer bargaining in the industrial, commercial and institutional sector of the construction industry. These amendments came into force on October 27, 1977. On April 28, 1978, the Minister of Labour, pursuant to section 127, designated the Association as an employer bargaining agency and the International and Local 95 as an employee bargaining agency. Section 125 of the Act defines an employee bargaining agency in sub-section (c) and an employer bargaining agency in sub-section (d). Local 95 is an affiliated bargaining agent as referred to in section 125(a) of the Act. The International and Local 95, pursuant to their designation as the employee bargaining agency, are authorized to represent in bargaining all journeymen and apprentice insulators and asbestos workers represented, *inter alia*, by Local 95 and bound by or parties to:

"collective agreements to which the Unions [the International and Local 95] or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario."

The Association, as a designated employer bargaining agency is authorized, pursuant to section 127(b) of the Act, "... to represent in bargaining provincial units of employers for whose employees affiliated bargaining agents hold bargaining rights, ...". The designation describes the provincial unit of employers as all employers bound by or parties to, *inter alia*

"collective agreements to which the Unions [the International and Local 95] or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario."

5. Having regard to all of the foregoing facts, the Board finds that, following the coming into force of the province-wide bargaining part of the Act on October 27, 1977, and upon the above-referred designations, the Association became the employer bargaining agency for Master and the International and Local 95 became the designated employee bargaining agency for Local 95. Pursuant to section 132(1) of the Act, the collective agreement between the Association and Local 95, insofar as it applied to the industrial, commercial and institutional sector of the construction industry, ceased to operate on its expiry date April 30, 1979. Section 132(3) provides that:



“Where any collective agreement mentioned in subsection 1 ceases to operate, the affiliated bargaining agent, the employer and the employees for whom the affiliated bargaining agent holds bargaining rights shall be bound by the provincial agreement made between an employee bargaining agency representing the affiliated bargaining agent and the employer bargaining agency representing the employer.”

6. Since section 133(3) of the Act states that:

“Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated from the 30th day of April, 1978.”

and since the collective agreement between the Association and Local 95 would cease to operate on April 30th, 1979, when the Association and the International and Local 95 were made designated bargaining agencies, their designations stipulated that the first provincial agreement negotiated between them would be for a term running from April 30, 1979 to April 30, 1980. A provincial agreement as referred to in section 125(e) means, in part,

“... an agreement ... covering the whole of the Province of Ontario between a designated ... employer bargaining agency that represents employers, on the one hand, and a designated employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause (e) of section 106.”.

7. The Association and the International and Local 95 signed the Agreement referred to in paragraph 2 above June 5, 1979 to be effective from May 14, 1979 until April 30, 1980, which pertains, *inter alia*, to the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. The Agreement is similar in scope, if not identical, to its predecessor. The Board is satisfied, on the evidence, that the Agreement meets all of the conditions set out in section 125(e) of the Act for a provincial agreement and finds, therefore, that it is a provincial agreement as referred to in that section. Since the bargaining rights established for Local 95 in respect of employees of Master under the predecessor collective agreement have not been declared terminated by the Board in any proceeding before it, the Board finds that by operation of section 132 of the Act, subsections 1 and 3, Master is a party bound by the Agreement insofar as it relates to the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. In respect of the bargaining rights existing under the predecessor collective agreement, the Board notes also that the evidence before it reveals that Master, by virtue of a consent agreement between Local 95 on the one part and the Association and Master on the other part, accepted that it was bound to a collective agreement between Local 95 and the Association. The Board's record in Board File No. 1882-78-M establishes that the consent agreement was in respect of a grievance between Local 95 and Master arising under the aforesaid predecessor collective agreement.

These are the same bargaining rights, in respect of the industrial, commercial and institutional sector, which the Board has found to have flowed through from that predecessor collective agreement. The fact that Master resigned its membership in the Association, whether before or after the expiry date of that agreement, does not serve to terminate the bargaining rights which existed under it in respect of Master's employees. In this respect, see the Board's decision in *Baker Gurney & McLaren*, [1976] OLRB Rep. Mar. 1978. Nor was it necessary for Master to have any employees when the Agreement was signed in order for Local 95's bargaining rights for Master employees to flow through from the predecessor agreement to the Agreement (section 110 of the Act).

8. Having regard for the Board's finding that Master and Local 95 are bound to the Agreement and that it is a provincial agreement referred to in section 125(e) of the Act and since section 134(3) of the Act provides that:

"Any employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by a provincial agreement shall be considered to be a party for the purposes of section 112a."

the Board has jurisdiction to determine the grievance referred herein pursuant to its authority under section 112a.

9. The grievance was referred to the Board on March 7, 1980 and alleges that Master has violated the Agreement from and after September 8, 1979 and was continuing to violate the Agreement as at the making of the referral. It was heard during six days of hearings between March 21, 1980 and July 30, 1980. During the course of the proceedings the Board denied consent to Local 95 to amend its grievance to allege that the violations commenced from May 14, 1979, the effective date of the Agreement.

10. Having regard to the evidence before it, the Board makes the following findings of fact.

- (a) For the week of May 12, 1979, and for one other day, Master employed two persons, George Radocaj and John Beckett to perform work for Inglis Limited replacing old insulation on pipes in its factory.
- (b) During a period of approximately seven days starting on or about May 26, 1979, Master employed George Radocaj to perform work for Kimberley-Clark of Canada Limited repairing duct insulation in its plant.
- (c) For the week of June 9, 1980, and on June 17th and 20th, Master employed George Radocaj and John Beckett to perform work for Canada Wire and Cable Limited to repair pipe insulation in its factory by replacing old insulation with new.
- (d) The work performed in items (a), (b) and (c) is work falling within clause 1.02 of the Agreement and pertains to the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

- (e) Master did not hire either Radocaj or Beckett through Local 95 pursuant to clauses 2.01(a), 2.01(b) or 2.04 of Article II – Hiring of the Agreement as set out below:

“2.01(a) The employers shall employ as members of the Union [the International and Local 95] in good standing in the performance of all work coming within the scope of this Agreement and shall continue in their employ only employees who are in good standing with the Union [the International and Local 95].

2.01(b) All such employees shall be hired through the Union [the International and Local 95] Office except as hereinafter provided.

2.04 The employers shall have the right to procure workmen from available sources other than from the Union [the International and Local 95] on jobs located within the local jurisdiction when the Union [the International and Local 95] has failed to furnish the required number of competent and qualified employees within two (2) working days following a written request by an employer. Immediately upon hiring, such workmen shall be considered to be emergency help. The employer, after consultation with the Union Business Manager, shall designate the classification within which such emergency help falls, and they shall be entitled to receive hourly rates of pay applicable to such classification. Emergency help shall be issued referral cards for identification and classification only, but shall not come within the scope of this Agreement except as noted in Clause 9.01, and shall be replaced as soon as competent Union [the International and Local 95] employees are available. Emergency help shall not be counted in the ration for the duration of the emergency.”

- (f) Master obtained a sub-contract dated October 18, 1978, from J.H. Lock & Sons Limited (“Lock”) to supply and install insulation materials on a construction site for Kellog-Salada Ltd., in Rexdale, Ontario.
- (g) The work as set out in the contract from Lock is work in the industrial, commercial and institutional sector of the construction industry referred to in section 106(e) of the Act and falling within clause 1.02 of the Agreement.
- (h) Master began performing this contract in October 1979 and at all material times supervised the work and supplied the materials to the job. The progress payments which Master received from Lock for work performed covered supply and installation of insulation materials, including labour.
- (i) Master arranged with Tecumseth Insulation Services Limited (“Tecumseth”) to supply the labour for Master’s contract with



Lock. By letter dated July 31, 1979, Tecumseth confirmed its price to be the total cost of "... the base rate plus all checkoffs and carrying charges." plus a fee of twenty (20) per cent of that total cost. During the 16 weeks from the week ending October 19, 1979 to and including the week ending February 1, 1980, Tecumseth billed Master for approximately 1,286 man hours of labour.

- (j) Master did not contact Local 95 to see if members were available for hire by Master before arranging with Tecumseth to supply labour to the Kellog-Salada job. Nor did Master attempt to ascertain whether Tecumseth was in a contractual relationship with Local 95 pursuant to clause 8.01 of Article VIII – Performance of Work of the agreement.
- (k) Tecumseth is not in a contractual relationship with Local 95.
- (l) At all times material to this referral, there were members of Local 95 who were unemployed and available for employment pursuant to the Agreement and there were contractors who were in a contractual relationship with Local 95.

11. Having regard for Article II – Hiring of the Agreement, clauses 2.01(a), 2.01(b) and 2.04, and for the fact that Master engaged Radocaj and Beckett to perform the work referred to in items 10(a), (b) and (c) without proceeding in accordance with the aforesaid clauses, the Board finds that Master has failed to comply with Article II – Hiring and has violated clauses 2.01 and 2.04 of the Agreement.

12. Clause 1.02 of Article I – Recognition and Scope and clause 8.01 of Article VIII – Performance of Work of the Agreement state as Follows:

"1.02 'Employees' as used herein shall mean and include all mechanics, improvers and/or apprentices who are members of the Union [the International and Local 95]. This Agreement covers the rates of pay, rules and working conditions of all mechanics and improvers of that work traditionally and regularly performed by this craft for the employers signatory to this Agreement at the site of construction, in performance of the preparation, distribution, fabrication, alteration, application, erection, assembling, molding, spraying, pouring, mixing, hanging, adjusting, repairing, dismantling, reconditioning, maintenance, finishing and/or weather proofing, of cold or hot thermal insulation with such materials as may be specified when these materials are to be installed for thermal purposes in voids, or on other piping, fittings, valves, boilers, ducts, flues, tanks, vats, equipment, or on any hot or cold surface for the purpose of thermal control and such other work as may be awarded the Union [the International and Local 95] pursuant to a trade jurisdictional award."

"8.01 Neither the Union [the International and Local 95] nor any active card-carrying employee shall contract, sub-contract make estimates for or in respect of the application of insulation, within the scope of this Agreement, and no employee shall act in any capacity other than that of

an employee of the employers. The employers agree that they will only sublet or contract out any work within the jurisdiction of Local 95 as described in Clause 1.02 to firms which are in contractual relationship with Local 95. The exception to this shall be when a specialty contractor is specified."

In light of those clauses and the fact that Master contracted with Tecumseth for the supply of labour under Master's contract with Lock and Tecumseth is not in a contractual relationship with Local 95, the Board finds that Master has sublet or contracted work to Tecumseth contrary to the provisions of clause 8.01.

13. Prior to dealing with the liability of Master in respect of the aforesaid violations of the Agreement, it is necessary for the Board to deal with some procedural issues which arose during the hearing. At the hearing on June 16, 1980, the Board ruled that it would hear evidence of events relating to the alleged violations up to that date of hearing. By then the Agreement had expired pursuant to section 134(3) of the act, *supra*. The matter was continued for hearing on July 29. During the hearing on that day, Local 95 counsel asked leave of the Board to introduce evidence of events after June 16 and up to the date of hearing on July 29. Counsel contended that, while the Agreement had expired on April 30, 1980, its terms were extended beyond that date by the "freeze" imposed by section 70(1) of the Act on "... rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, ...". The Board heard and considered the representations of both counsel and ruled that, in order that all of the issues with respect to the alleged violations of the hiring and or sub-contracting provisions of the Agreement be heard and dealt with, it would admit evidence of events up to the earlier of the end of the section 70 freeze or the date of the hearing (July 29).

14. By letter dated January 24, 1980, addressed to the Association, Local 95 served notice of "... its intention to negotiate the renewal, ... of the collective agreement applicable in all sectors of the construction industry as per Article XVIII section 18.01 of the current Collective Agreement". On April 18, 1980, Local 95 filed with the Minister of Labour a Request for Appointment of Conciliation Officer and duly served a copy of the request on the Association. Counsel for Master acknowledged that it received a copy of the request also. Neither the Association nor Master opposed the request. A letter from the Deputy Minister of Labour dated May 7, 1980, was sent to Local 95 advising it of the appointment by the Minister of conciliation officer Mr. P.G. Gardner. Subsequently, by further letter dated June 6, 1980, from the Deputy Minister, Local 95 was advised that the Minister had decided not to appoint a Board of Conciliation in the negotiations between Local 95 and the Association (colloquially referred to as a "no board" report). The Board is satisfied, in the absence of contrary evidence, that both letters from the Deputy Minister were sent also to the Association.

15. Counsel for Master argued that the section 70(1) freeze period had not been triggered because the Agreement did not conform to section 133(3) of the Act and was, therefore, a nullity or, in the alternative the notice to bargain given by Local 95 was not notice to bargain given by Local 95 was not notice pursuant to section 45 of the Act. On the first point, counsel argued that section 133(3) stipulates that agreements pertaining to the industrial, commercial and institutional sector of the construction industry shall provide for their expiry on "... the 30th day of April calculated biennially from the 30th day of April, 1978.". Since that wording contemplates an agreement of two years duration and the Agreement was for a one year term, counsel contends that it does not conform to the Act and,

therefore, is not valid. That argument fails on several counts. The legislature in formulating the province-wide part of the Act, obviously contemplated the problem of bringing the expiry dates of subsisting agreements pertaining to the industrial, commercial and institutional sector into step with section 133(3). In section 132(2) it provided retroactively for such agreements that "... were entered into after the 1st day of January, 1977 and before the 30th day of April 1978...[to] be deemed to expire not later than the 30th day of April 1978, regardless of any provision respecting its term of operation or renewal.". Agreements entered into prior to January 1st, 1977 which were in operation when section 132(1) came into force (i.e. October 27, 1977) were, by that section, "... enforceable and binding on the parties thereto only for the remainder of the term of operation of the agreement, regardless of any provisions respecting its renewal.". Since that section, as stated earlier in this decision, caused the predecessor collective agreement to cease to operate on April 30th, 1979, it was necessary for the Agreement to be for a term which expired on April 30, 1980 to bring it in phase with section 133(3) on the earliest possible date. To this end, the Minister's designations of the Association and of the International and Local 95 as bargaining agencies stipulated that the first provincial agreement between them be for a term of April 30, 1979 to April 30, 1980.

16. While the wording of section 133(3) of the Act does provide for every provincial agreement to be for a two year term expiring on the 30th day of April in "even" years, when that wording is construed having regard to section 132(1) and all of the province-wide bargaining provisions, it readily accommodates a first provincial agreement of less than two years duration. The Board finds therefore, that the Agreement not only does not violate section 133(3), but is consistent with the requirement of that section.

17. Counsel argued that the notice to bargain given by Local 95 satisfied neither the requirements of clause 18.01 of the Agreement nor section 45 of the Act because it was given prior to the commencement of the period of 90 days before the Agreement ceased to operate. The Agreement provides that the party desiring to terminate or bargain a renewal of the Agreement "... shall furnish the other with notice... within a period of 90 days before April 30th,...". Section 111 of the Act deals with notice to bargain in the construction industry and notice given pursuant to that section "... has for all purposes the same effect as a notice under section 45." Both sections 45 and 111 provide that either party to a collective agreement may give notice to the other of desire to bargain "... within the period of ninety days before the agreement ceases to operate,...". Local 95's notice was dated January 24th, 1980, clearly prior to the start of the 90 day period contemplated by the Act and the Agreement. Does this invalidate the notice? The Board thinks not.

18. Notwithstanding the apparently premature notice, the two bargaining agencies met and bargained, according to the request for conciliation, on January 29th, February 12th, March 5th and March 27th, 1980. A conciliation officer was appointed on May 7th, 1980, to attempt to bring about a collective agreement and, ultimately, the minister's "no board" report was issued. There is no evidence that the Association contested the notice to bargain, nor did it or Master object to the appointment of the conciliation officer. Section 15(2) of the Act gives the Minister the discretion to appoint a conciliation officer "Notwithstanding... the failure of either party to given written notice under sections 45 and 111, where the parties have met and bargained,...". Had there been any challenge to the Minister's authority to appoint an officer on the grounds that the notice to bargain was premature, since the two designated bargaining agencies had met and bargained, the Minister clearly would have had the jurisdiction to appoint an officer as, indeed, was done.



19. As already stated, there is no evidence that the Association rejected the early notice and Local 95 certainly did not withdraw it. In fact the parties held their first meeting prior to the start of the ninety-day period. It is also patently clear from the conduct of the parties that they did not consider the early notice defective. The fact that they met and bargained, in the Board's view, has corrected any defect in the notice, if indeed there was one. Or, put another way, by meeting to engage in bargaining, the parties have effectively given notice one to the other. They met not once but three times after the start of the 90 day period and before conciliation. This is not the conduct of parties who intended to allow the Agreement to continue for another term, which would have been the result of failure to give notice and the absence of bargaining. Moreover, it would be inconsistent with the scheme of the Act for the Board to view section 45 so narrowly as to hold the kind of notice given here to be invalid in spite of the conduct of the parties which followed the notice. There are several important rights under the Act which are affected in one way or another by the giving of notice: the right of a union to engage in a lawful strike or any employer to engage in a lawful lockout; the right of parties to challenge an incumbent union's status as bargaining agent and the right of parties to an agreement to request conciliation services. It is inconceivable that the Act should be applied in such a way that either Local 95 or the Association, having bargained as they did, could then attempt to interfere with one of the rights affected by section 45 notice by claiming that Local 95's notice did not satisfy the Act. A simple example would be to take the same facts in respect of notice and bargaining as we have here but without the request for conciliation and inject an application made after the Agreement's expiry date to have Local 95's bargaining rights terminated. If the Board accepted the argument of counsel for Master, Local 95, in spite of its bargaining conduct, could rely on the defence that the application was untimely because the Agreement had been continued for a further term as a result of proper section 45 notice not having been given.

20. Furthermore, to accept the view of counsel for Master that Local 95's notice did not satisfy section 45, even in the circumstances of the ensuing bargaining, would result in potentially absurd applications of the Minister's discretion under section 15(2) of the Act. Or, where the language of an agreement provides for its automatic renewal if neither party gives notice, counsel's view of section 45 notice would render section 15(2) meaningless in situations where the parties had met and bargained but had not given written notice.

21. Therefore, in the circumstances of this case, the Board finds that the notice given by Local 95 to the Association was notice pursuant to sections 45 and 111 of the Act.

22. Counsel for Master contends also that the grievance was untimely because it was not filed within the limits specified by clause 6.04 of the Agreement. That clause states that a referral under section 112a must be filed "... within one hundred eighty days (180 days) immediately following the date of the happening of the event giving rise to the grievance, complaint or dispute, failing which the parties agree that they will be deemed to have abandoned such grievance...". Counsel relies on the fact that Master's arrangement for subcontracting the labour content of the Salada-Kellog project to Tecumseth was completed when Tecumseth confirmed its terms in a letter dated July 31, 1979. If this is the event giving rise to the grievance, it is obviously more than 180 days prior to this referral. The fact is, however, that there was no visible evidence of the arrangement until Master established its presence on the project in October 1979. In the Board's view, that is the event which ultimately gave rise to this referral being made and, therefore, the referral meets the requirements of clause 6.04.

23. In the course of making the foregoing argument, counsel also argued that, since the sub-contract with Tecumseth was made prior to September 6, 1979, the Board should discount the entire evidence about it. He was relying on the July 31, 1979 date of Tecumseth's letter to bring the sub-contract within the scope of the Board's ruling which denied Local 95's request to amend its referral to cover alleged violations prior to September 8th. The Board finds this argument to be without merit. Even if July 31st was accepted as the beginning of the sub-contract, Tecumseth's performance of it was an on-going event lasting from October 1979 until the week ending February 1, 1980, therefore occurring entirely after September 8, 1979.

24. During the course of the proceedings, counsel for Master twice objected to the subpoenas personally served on two principals of Master, particularly in respect of the all-encompassing nature of the description of documents in the summons *duces tecum*. Counsel claimed that his clients were being subjected to a fishing expedition and contended that they should not be required to produce the documents. On the first occasion that counsel raised his objection, it was joined with the objection that the grievance was entirely lacking in particularity and that these two circumstances amounted to nothing more than a fishing expedition by Local 95. In expressing his objection, counsel referred to both the Board (differently constituted) and the Divisional Court having recognized the validity of a similar complaint by one of his clients about a similar summons *duces tecum* served in connection with the grievance which was the subject of the September 6th consent agreement between the parties. Consequently, he submitted that this Board should not allow Local 95 to proceed with the instant grievance. The lack of particularity and/or specificity in the grievance was raised at the second day of hearing on April 14th. It had not been raised on March 21st, the first day, by another lawyer who appeared for Master that day, nor was it raised in the interval between the hearings. Since the Board had found on March 21st that Master and Local 95 were bound to the Agreement and that the Board, therefore, had jurisdiction to hear and determine the grievance and no objection having been made to the broad cast of the grievance until the second day of hearing, the Board ruled that it would proceed to hear it. It also ruled that any objections of Master's counsel to the documents Local 95 counsel sought to have produced would be heard and considered by the Board on a document by document basis.

25. In arguing his case, counsel for Master claimed that the board cast of the grievance and the sweeping nature of the summons *duces tecum* combined with the Board's process permitted Local 95 to perfect its grievance during the course of the Board's proceedings. In other words, counsel was claiming that Local 95 did not have any knowledge of specific events about which it could grieve until it flushed them out by having Master come and testify against its own interests. In his view, therefore, the Board should dismiss the grievance. The Board is not without concern about grievances referred to it which only broadly allege violation of the collective agreement, even when they are specific as to the sections alleged to have been breached. It will not permit its broad powers and its procedures to be abused by a party seeking to learn whether in fact it has a grievance. Any party which refers a grievance that is so broadly stated as to raise that suspicion runs the risk either of delay in having its grievance determined or having the Board rule that it is so lacking in specificity as to be not arbitrable. On the other hand, the Board must be sensitive to the realities of the construction industry with its scattered job sites and the large number of small employers and the difficulties which these conditions create even for a trade union which attempts diligently and assiduously to assert its bargaining rights and police its collective agreements. There are many ways by which an employer who is bent on ignoring his responsibility under a collective agreement can obscure his presence on a job site. This makes it difficult for a union to know whether an employer with whom it has an

agreement is performing work at all. Once a union learns of an employer's presence on a job, it may be able only to determine that the employer is performing work for which the union claims jurisdiction under the collective agreement. That may be the extent of the information on which it must rely to file a grievance. In these circumstances, the Board cannot set hard and fast conditions for specificity and particularity but must look at each grievance on its merits if it is challenged as being too lacking in its particulars or not specific enough in stating the alleged violation.

26. In the case at hand, while Local 95's grievance was lacking in particularity as to precisely how and when Master had violated the hiring and sub-contracting clauses of the Agreement, the Board is satisfied that it was not on a fishing expedition and seeking to perfect its grievance through the process of the Board's hearings. It called evidence about the Kellogg-Salada job through a witness independent of Master in support of its claim and it is clear from the beginning of its examination of witnesses that it had some knowledge of the Kellogg-Salada job. The same cannot be said for the work referred to in paragraph 10, items (a), (b) and (c). It is obvious that these events have taken place since this referral was filed with the Board. The grievance does allege, however, that Master "... has violated and continues to violate..." the hiring and sub-contract provisions of the Agreement from and after September 8, 1979. Particularly where it is apparent, as it is here, that the employer is ignoring one of the major job security provisions of its collective agreement (i.e., the sub-contracting provision) or where it is evident that no effort has been made to comply with important protection provisions of an agreement, there is no sound reason why the arbitrator cannot deal with the continuing violations where the grievance alleges that there are continuing violations and they do continue after the filing of the grievance, including while the matter is still before the arbitrator. See *Williams Contracting Ltd.*, [1980] OLRB Rep. July 1115, at paragraph 29.

27. Having regard for all of the foregoing and in particular for the findings of fact that:

- (a) Master has violated clauses 2.01 and 2.04 of the Agreement by hiring persons other than members of Local 95 to perform the work referred to in items (a), (b) and (c) of paragraph 10 herein; and
- (b) Master has violated clause 8.01 of the Agreement by contracting with Tecumseth for the supply of labour for Master's contract with Lock when Tecumseth was not in a contractual relationship with Local 95; and
- (c) At all material times there were members of Local 95 available for employment pursuant to the terms of the Agreement and there were contractors who were in a contractual relationship with Local 95,

the Board further finds that members of Local 95 have been denied the opportunity to earn wages and to have paid to them or on their behalf all of the requisite payments and contributions under the Agreement. As a result, Master has failed also to make requisite payments under the Agreement to Local 95.

28. Having further regard for the reasoning expressed in *Napev Construction Limited*, [1980] OLRB Rep. Feb. 297, at paragraph 6 and for the principles contained in *Re McKenna Brothers Ltd. and Plumbers Union Local 527* 10 LAC (2d) 273 (Shime) and in the decision of



the Ontario Court of Appeal in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, 57 DLR (3d) 199, the Board finds that Local 95 is entitled to relief for and on behalf of itself and its members in the form of a sum of money equivalent to all payments which should have been made pursuant to the Agreement and were not for all hours of work performed, as a result of the aforesaid violations, by persons who were not members of Local 95 and not engaged pursuant to the term of the Agreement.

29. The parties are directed to meet and agree on the amount of damages owing to Local 95 as a result of Master's violation of the Agreement. Should they be unable to do so, the parties are agreed that the Board remains seized of this matter in respect of the amount of damages.

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**1744-80-R Teamsters, Local Union No. 990, affiliated with the International Brptherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. Mount McKay Feed Company, Limited, Respondent**

**Bargaining Unit – Certification – Parties agreeing to exclude students but disputing exclusion of part-time employees – Board excluding both groups**

**BEFORE:** Ian C.A. Springate, Vice-Chairman, and Board Members H.J.F. Ade and C.A. Ballentine.

**APPEARANCES:** *D. Swait for the applicant; and J. Carrier for the respondent.*

**DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER H.J.F. ADE; January 5, 1981**

1. This is an application for certification.

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4. The parties are in agreement on all issues relevant to the description of the bargaining unit, except as to whether or not persons regularly employed for not more than twenty-four hours per week should be excluded from the bargaining unit. The respondent currently employs one person within his category. the respondent also has a practice of employing students during the school vacation period, and the parties are in agreement that this category of employee should be excluded from the bargaining unit. In all of the circumstances, and having regard to the Board's general practice of linking students and part-time employees together, we are of the view that it would be appropriate to exclude both students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week from the bargaining unit under consideration.

5. Having regard to the above determination, and to the agreement of the parties with

respect to all other matters relevant to the description of the bargaining unit, we find that all employees of the respondent at Thunder Bay, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

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7. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER C.A. BALLENTINE:**

1. As the majority noted in paragraph 4 of its decision, the parties were agreed on the description of the bargaining unit save as to whether persons employed for not more than twenty-four hours per week (part-timers) should be included or excluded from the bargaining unit. Both the trade union and employer agree that students should be excluded from the unit, but the union asked for the inclusion of the part-timer while the respondent requested the Board to follow its usual practice and exclude both the part-timer and students employed during the school vacation period.

2. In the normal case, the respondent's request would have been acceded to by the Board. However, in this case, there was only one part-time employee, and at the time the application for certification was made, that one employee was the only employee in the excluded categories of part-timers and students.

3. The existence of a single part-time employee constitutes grounds for the Board to depart from its usual practice in describing bargaining units. The Board has recently noted this basis for the exception to the usual rules the Board applies in describing bargaining units in *Duncanwoods Realty Limited*, [1979] OLRB Rep. May 385 where the Board stated at page 386:

"Where there is only one part-time employee and such an employee desires to be represented in collective bargaining, it is the practice of the Board to include such an employee in a bargaining unit together with full-time employees. See, for example, *The Essex County Humane Society*, [1969] OLRB Rep. June 391. Similarly, where there is one full-time employee and such an employee desires to be represented in collective bargaining, it is also the practice of the Board to include such an employee in a bargaining unit together with part-time employees. See, for example, the *Brinks Express Company Canada Limited* case, [1970] OLRB Rep. July 502. *The Board in such circumstances views the existence of one full-time or one part-time employee as a most exceptional circumstance* and consideration of representation versus no representation takes precedence over what would normally be an exclusionary approach based upon a concept of a different community of interest."

[Emphasis added]

4. It may well be that during the summer months, when the respondent hires students for the school vacation period, there will be more than one employee in the categories of

part-timers and students employed during the school vacation. However, that was not the case at the time this application was made. In *The Essex County Humane Society, supra*, there was only one employee in the excluded categories of students and part-timers. The Board in that case did not exclude those categories of employees from the full-time bargaining unit. The Board stated at page 391:

“In this case, there was only one person in the categories referred to and were that person desirous to be represented by the trade union he would be effectively prevented from being so represented if the Board were to follow its usual practice of excluding these classifications at the request of the respondent. Where there is only one employee who would be eligible for inclusion in what would otherwise be an appropriate bargaining unit and where, as in this case, that employee desires to be represented by the applicant union, the Board in such exceptional circumstance should depart from its regular practice of finding a separate bargaining unit for the employee concerned. The Board should therefore include such employee in the bargaining unit in this case.”

5. In my opinion, the circumstances of this case fall within the principles laid out by the Board in the cases referred to above. The majority's decision effectively deprives the one part-time employee of his right to engage in collective bargaining, and for this reason, I would not exclude the category of part-time employee from the bargaining unit. Because the parties were agreed that students employed during the school vacation period ought to be excluded from the bargaining unit, I would not set aside that agreement. However, if the Board were faced with a situation where the parties did not agree as to the exclusion of students in this situation, I would not have excluded either students or part-timers from the bargaining unit, following the reasoning as set out by the Board in *The Essex County Humane Society* case.

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**2017-80-R International Association of Machinists & Aerospace Workers, Applicant, v. 351121 Ontario Limited, Respondent, v. Group of employees, Interveners**

**Certification – Petition – Manager assisting in drafting of petition – Permitting circulation on company premises during work hours – Whether petition voluntary**

**BEFORE:** R.O. MacDowell, Vice-Chairman, and Board Members W.F. Rutherford and J. Wilson.

**APPEARANCES:** *W. Fraser, D. Bate, J. Reavely and D. Ferguson for the applicant; W. Sturgeon for the respondent; and F. Brandeau and W. Laird for the objectors.*

**DECISION OF THE BOARD; January 27, 1981**

1. This is an application for certification. Having regard to the representations of the respondent, the name of the respondent appearing in the style of cause of this matter is hereby amended to read: “351121 Ontario Limited (carrying on business as Gibb Manufacturing)”. For the purpose of clarity, the Board notes that the respondent is a subsidiary of Erie Iron Ltd. and that the present application does not affect the employees of that firm.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. Having regard to the representation of the parties the Board further finds that “all employees of the respondent in the City of St. Thomas, Elgin County, save and except, foreman, persons above the rank of foreman, office and sales staff” constitute a unit of employees of the respondent appropriate for collective bargaining.

4. In support of this application for certification, the trade union filed documentary evidence of membership on behalf of approximately seventy-three per cent of the employees in the bargaining unit found by the Board to be appropriate. This documentary evidence took the form of membership cards which include a combination application for membership, and an attached receipt. The cards are signed by the employees, and the receipts are countersigned, and indicate that a payment of one dollar has been made to the union. The documentary evidence is supported by a properly completed Form 8 statutory declaration, and demonstrates that the union has a level of “membership support” well in excess of that required for certification without recourse to a representation vote.

5. There was also filed with the Board a statement of desire or “petition” signed by a number of employees and indicating that they wished to oppose the certification of the applicant. This petition included the names of certain individuals who had previously signed membership cards and paid on dollar in respect of membership fee and were, therefore, “members” of the union within the meaning of section 1(1)(j) of the Act. These “members” had had a purported change of heart and now alledgedly no longer wished to support the applicant’s certification.

6. Statements of desire, or “petitions” are not regulated by the Act as directly, or precisely, as union membership evidence. There is no statutory definition equivalent to section

1(1)(j), nor is there any requirement for a monetary payment (in the nature of consideration confirming the act of signing), or a statutory declaration of regularity similar to Form 8. Nevertheless, the existence of statements of desire appears to be contemplated by section 92(2)(j) of the Act and Rule 48 of the Rules of Practice; and in any event, the Board has a long established practice of accepting such petitions and exercising its discretion to order a representation vote where: the petition is voluntary, there is evidence given in accordance with Rule 48, and the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt that the union's members continue to support its certification. The Board must be satisfied however, that when these members signed the petition evidencing an apparent change of heart, they were doing so voluntarily and were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer or could result in reprisals.

7. It must be clear that the circulation of the petition is free from the actual, or perceived, influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before; and while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. Frequently, such petitions are openly circulated on or near the employer's premises during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with the employer and may be so perceived. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to this employer. Similarly, an employee may be motivated to sign a petition because of employer conduct subsequent to his joining the union which suggests that continued support for the union will result in the loss of his job, or other adverse employment consequences. In neither case can one regard his signing the petition as truly voluntary because in both cases, it results from a perceived threat to his job security. On the other hand, some union supporters may well have reconsidered their position in response to the arguments of their peers, or because of their own reassessment of the relative benefits of collective bargaining. There may be no employer misconduct and no perceived threat to job security. It is for this reason that the Board undertakes the inquiry contemplated by Rule 48(5) in order to satisfy itself from the circumstances of the origination, preparation and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. In *Radio Shack* [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of this inquiry in a long passage to which we might usefully refer:

"The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union, represents a voluntary change of heart. The Board recognizes that the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC ¶16,264 in the following terms:

'In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself

with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.'

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.* and *Canadian Paperworkers Union*. [1975] OLRB Rep. No. 813 and the cases cited therein.)"

Similar views were expressed in *Valley Bottling of Canada Ltd.* [1978] OLRB Rep. August 784 where the Board put it this way:

"The Board has held in numerous decisions that a natural suspicion attaches to a statement of desire which follows on the heels of a union organizing campaign. The Board must assure itself that employees who have first indicated support for a trade union and then indicate a desire to withdraw that support have undergone this change of mind by their free choice; that is, free of overt or subtle influences issuing from the employer against the union. The Board, in assuring the rights of employees under the Act to select or reject a trade union as bargaining agent, recognizes the opportunity that employee's dependence on the employer for their job security gives the employer for undue influence their freedom of choice, *intentionally* or *unintentionally*." [Emphasis added.]

8. In the present case, the petition was signed by nineteen of the twenty-two individuals in the bargaining unit. Of these nineteen individuals, some thirteen had previously signed union membership cards indicating that they supported the union's certification. If all of the union's members who signed the petition had had a voluntary change of heart and now no longer wished to support the union's certification, the Board would have before it two contradictory pieces of documentary evidence concerning the employees' wishes and would, in accordance with its usual practice, order a representation vote to resolve the issue. This was



the course of action urged by William Sturgeon, appearing for the respondent, and Franklin Brandeau who appeared on behalf of the interveners. Both Mr. Sturgeon and Mr. Brandeau gave evidence concerning the origination, preparation and circulation of the petition, and certain meetings and events which occurred at about the same time that the petition was being circulated.

9. The respondent is a manufacturer of steel ironing tables and operates a plant located at 233 Edward Street in the City of St. Thomas. The floor space of the plant is divided into an office area occupied by the foreman and Mr. Sturgeon, an adjacent lunchroom facility used by the employees, and a manufacturing area which takes up about eighty per cent of the total floor space. The nominal management consists of a foreman and Mr. Sturgeon, Vice-President of Manufacturing.

10. Mr. Brandeau, the representative of the interveners is one of the two "lead hands" employed by the respondent. His duties include assigning and coordinating the work of other employees - especially on the night shift when there were no managerial personnel present. It was not contended that Mr. Brandeau himself exercised managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*; however, he is recognized as an individual having some authority over other employees, and a closer relationship with management.

11. On December 16, 1980, Mr. Sturgeon posted the Form 5 Notice to employees and spent about one hour with each shift explaining its contents - including the manner in which employees objecting to the union's certification should file their "statement of desire". Mr. Sturgeon also sought to ascertain how many of the employees supported the union, for, as he told the Board, if the union had majority support, he would be "wasting his time" talking to the employees. Sturgeon outlined the existing benefits and the future wage increases which employees were to receive and about which there was considerable confusion. In response to a question from the floor, Sturgeon indicated that the employees should get together, as a group, to discuss the matter further. He also indicated that they would be permitted to hold such meeting on company premises during working hours.

12. Following the meeting with the employees, Mr. Brandeau met privately with Mr. Sturgeon to discuss his opposition to the union and the form which an anti-union petition should take. Brandeau later approached Sturgeon again to ensure that the employees would be given time off and permitted to assemble in the lunch-room area where Brandeau planned to assess the support for his petition. No such meeting had ever previously been held.

13. During the week of December 15, Brandeau was scheduled to work on the evening shift which began at 3:30 p.m. On the morning of December 17, however, Brandeau and William Laird, another employee, spent about two to three hours in the management office area interviewing employees concerning their support or opposition to the trade union. Laird was scheduled to work during that day, but was permitted time off for this purpose, and as we have already indicated, employees do not normally frequent the office areas. Brandeau discussed the employees' position while Laird took notes, and checked off on a list whether employees were in favour of, or against the union. It is not entirely clear how employees were directed to the office areas, however, given the number of persons interviewed, it is obvious that they must have been directed to the office and permitted to leave their ordinary work for this purpose. While there is no direct evidence of managerial involvement (other than

permitting Brandeau and Laird to use the office, and allowing Laird and the employees interviewed to be absent from work), the respondent's management must have been aware of the nature and purpose of Brandeau's activities, and an employee might reasonably suspect that Brandeau was acting on behalf of the employer – as, in a sense, he was. He had after all, discussed with Sturgeon the form which the anti-union petition should take, and subsequently met again to confirm that there would be a meeting on company premises during working hours where he could canvass opposition to the union. This is not to say that Brandeau's own opposition resulted from employer influence, but rather that, in the circumstances, the employees would reasonably see that Brandeau enjoyed the active support of the respondent, and that it would be unwise for them to reveal their support for the union by refusing to sign his petition.

14. Brandeau left the plant around noon and returned shortly before the scheduled end of the day shift. The shift was permitted to end early and was joined by the incoming evening shift in the lunchroom adjacent to the office area where the employees discussed the union's certification application. No managerial employees attended this meeting although, of course, the employees were permitted to be absent from work during the meeting. The evidence of what transpired is somewhat unclear. At first, Brandeau testified that the "pros and cons" of the union's position were discussed and he had made known his own views. Subsequently, he indicated that no disadvantages were raised, and no one identified himself as in favour of the union. By this time, of course, almost seventy-five per cent of the employees had signed union membership cards indicating their support for the applicant's certification. Brandeau also testified that he had no idea of who was a trade union supporter and who was not – a statement which is difficult to reconcile with the inquiry which he and Laird had undertaken earlier that day. In any event, Brandeau and the other lead hand conducted a vote and upon counting the ballots decided that they should proceed with the petition.

15. The next day, Brandeau prepared the petition document along the lines formulated in his earlier discussion with Mr. Sturgeon. All of the signatures were solicited by Brandeau himself who circulated about the plant for about one half hour during the working hours of the day shift on December 18th. Brandeau himself was scheduled on the night shift and collected the remaining signatures when the evening shift employees came in to work. The petition was presented to them at the door as they came in and all of them signed. Brandeau testified that he took care to ensure that the names on the petition were covered so that the identity of the signatories would be preserved, but he also indicated that he had freely expressed his own opinion that if the employees chose to support the union they were "cutting their own throats" and if a trade union were certified, the plant would close.

16. Both the respondent and the representative of the interveners, argue that the Board should find the petition to be a voluntary "change of heart", and to follow its usual practice in such circumstances of ordering a representation vote. Having carefully considered the evidence, we find that we cannot accept that contention. Although we accept Mr. Sturgeon's evidence that there were no overt threats made by him, and he was merely trying to assist employees opposed to the union, the petition appeared to be linked with management from the very first discussion following the posting of the Form 5 Notice. The petition was drafted with the assistance of Mr. Sturgeon; the employees were given time off work to discuss the matter; the petition was circulated on company premises and company time by a lead hand who the day before had been interviewing employees on their trade union sympathies in the offices of management and taking notes on their answers; and in discussing the petition Brandeau

indicated that if the union were successful, the plant would close. In the circumstances, it is not surprising that virtually all of the employees signed the petition, for a refusal to do so would clearly identify them as union's sympathizers and they had no assurance that their views would not be immediately communicated to their employer and result in adverse consequences. In the circumstances, we are satisfied that employees would likely have signed the petition regardless of their real views concerning trade union representation, and accordingly, we are not satisfied that the petition document represents the voluntary wishes of those who signed it, or accurately reflects their actual opposition to the applicant's certification. We prefer instead to give weight to the trade union's documentary evidence of membership and, as we have already pointed out, that documentary evidence indicates sufficient support to merit certification without recourse to a representation vote.

17. Having regard to the totality of the evidence before us, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant on December 24, 1980, which is the terminal date fixed for this application and the date which the Board determines pursuant to section 92(2)(j) of *The Labour Relations Act* to be the time for ascertaining evidence of membership under section 7(1) of the Act.

18. A certificate will issue to the applicant.

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**1894-80-U Florence M. Casey, Applicant, v. Ontario Secondary School Teachers Federation (Sault Ste. Marie Division) and Ontario Secondary School Teachers Federation, Respondents.**

**Duty of Fair Representation – Whether section 60 of *The Labour Relations Act* available to teacher – Whether Board has remedial authority under *The School Boards and Teachers Collective Negotiations Act***

**BEFORE:** R.O. MacDowell, Vice-Chairman, and Board Members J.A. Ronson and W.F. Rutherford.

**APPEARANCES:** *F.M. Casey, for the applicant; and M.A. Green, J. Forster and J. Agnew, for the respondents.*

**DECISION OF THE BOARD;** January 20, 1981

1. The name: "(1) OSSTF Sault Division and (2) OSSTF Provincial Office" appearing in the style of cause of this application as the name of the respondent is amended to read: "(1) Ontario Secondary School Teachers Federation (Sault Ste. Marie Division) and (2) Ontario Secondary School Teachers Federation".

2. This is an application under section 79 of *The Labour Relations Act* in which the complainant, Florence M. Casey, contends that the respondents have contravened section 60 of the Act. The provisions of *The Labour Relations Act* which are material to this application read as follows:



Section 60: A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Section 2(f): This Act does not apply to a teacher as defined in *The School Boards and Teachers Collective Negotiations Act, 1975*, except as provided in that Act.

3. The respondent, Ontario Secondary School Teachers' Federation ("OSSTF"), through its local branch affiliate, is the statutory bargaining agent for the Secondary School Teachers employed by the Sault Ste. Marie Board of Education ("the employer"). Ms. Casey is one of the teachers employed by the employer, holds a permanent contract in the form prescribed by *The Education Act*, and is a member of the respondent's local branch affiliate. There is a subsisting collective agreement between the respondent OSSTF and the employer which applies, *inter alia*, to the complainant.

4. The origin of the present complaint is a dispute between Ms. Casey and her employer concerning the interpretation of the seniority and staffing provisions of the collective agreement. This dispute prompted Ms. Casey to file a grievance which was processed through several steps of the grievance procedure. A board of arbitration was selected to hear and determine the matter, but prior to the hearing, the OSSTF decided not to proceed to arbitration and withdrew the grievance. Ms. Casey appealed to the senior officials of the OSSTF, however, after considering her position, they declined to intervene.

5. In view of the preliminary argument raised by the respondent(s), the Board did not consider it necessary to entertain evidence concerning the reasons why the local and provincial officials declined to proceed to arbitration with Ms. Casey's grievance. It suffices to say that there still remains a dispute between Ms. Casey and her bargaining agent concerning the merits of her grievance, the intended meaning of the language in her collective agreement, and the advisability of proceeding to a board of arbitration for a resolution of this issue. Ms. Casey urges this Board to inquire into her complaint, on its merits, and if we find a contravention of section 60, to make a remedial order essentially involving a direction that the respondent OSSTF proceed to arbitration with her grievance. The respondent(s) contend that neither *The Labour Relations Act*; nor *The School Boards and Teachers Collective Negotiations Act* give this Board jurisdiction to undertake that enquiry or entertain Ms. Casey's complaint.

6. Section 60 of *The Labour Relations Act* was enacted in 1971, and involves the recognition by the Legislature that the statutory right to act as the employees' exclusive bargaining agent should carry with it a concomitant obligation to fairly consider the rights and interests of individual members of the bargaining unit - whether or not they are members of the union. Section 60 is an attempt to achieve a balance between the interests of the individual and the interests of the collectivity, and it enshrines legislatively the now famous elaboration of the duty of fair representation originally framed by the Supreme Court of the United States in *Vaca v. Sipes* (1967) 386 U.S. 1971 - that a trade union is prohibited from acting "in a manner that is arbitrary, discriminatory, or in bad faith in the representation of any of the employees in the bargaining unit". [For some of the background preceding the passage of section 60, see

Carr, *The Development of the Duty of Fair Representation in Ontario* (1968) 6 Osgoode Hall Law Journal 485; and Paliare, *Tilting Against the Windmills: The Individual's Right to Arbitration* (1970) 8 Osgoode Hall Law Journal 45]. In the United States, the Courts have developed an elaborate jurisprudence with respect to the duty of fair representation but, in Canada, early common law developments (see: *Fisher v. Pemberton et al* (1970), 8 D.L.R. (3d) 521) have been superseded by statute and the matter has generally been dealt with by statutory labour relations tribunals.

7. Provisions analogous to section 60 are common in most provincial jurisdictions. In Ontario, an explicit statutory duty of fair representation can also be found in section 28 of *The Crown Employees' Collective Bargaining Act*, S.O. 1972, c. 67, and section 77 of *The Colleges' Collective Bargaining Act*, S.O. 1975, c. 74. The difficulty faced by the complainant in this case is that there is no equivalent provision in *The School Boards and Teachers Collective Negotiations Act*, S.O. 1975, c. 72; and because of the section 2(f) of *The Labour Relations Act*, the statutory duty and remedial machinery provided in *The Labour Relations Act* are not available to her. Accordingly, assuming, without finding, that the complainant would be able to establish a breach of the section 60 duty, *The Labour Relations Act* does not give this Board jurisdiction to enquire into the matter or grant her relief.

8. Does *The School Boards and Teachers Collective Negotiations Act* provide a jurisdictional basis for entertaining the complainant's case? After perusing the provisions of that Act, we are satisfied that it does not. As we have already mentioned, there is no express statutory duty of fair representation, nor is there any general provision similar to section 79 of *The Labour Relations Act* empowering this Board to enquire into a contravention of the Act and, if such contravention is established, to fashion a remedy. There is a limited role for the Board in respect of unlawful strikes and lock-outs and also in respect of certain *penal* provisions of the statute. (See section 78.) Persons or organizations which have contravened the statute are guilty of an offence punishable on summary conviction by a fine, and no such prosecution (in Provincial Court Criminal Division) can be launched without the consent of the Board. However, *The School Boards and Teachers Collective Negotiations Act* does not contain a provision paralleling section 79 of *The Labour Relations Act* or granting this Board a similar broad *remedial* authority to rectify contraventions of the Act. Such provisions are of a substantial and substantive nature and we do not think that they can be "read in" or "implied" as the complainant urges us to do.

9. Our attention was directed to section 5 of *The School Boards and Teachers Collective Negotiations Act* which reads as follows:

A branch affiliate shall, in negotiations and procedures under this Act, represent all the teachers composing its membership.

Assuming, without finding, that the grievance/arbitration procedure prescribed by the collective agreement can be considered a "procedure under this Act", there is still a significant absence of any language concerning the quality or standard of representation to which the teacher organization must comply. There is simply no equivalent to section 60 of *The Labour Relations Act*, section 28 of *The Crown Employees Collective Bargaining Act*, or section 77 of *The Colleges Collective Bargaining Act*. Where a statutory duty of fair representation (framed on the *Vaca v. Sipes* model) has been part of the legislative landscape for some years and appears in express terms in a number of other labour relations statutes, it is difficult to

conclude that section 5 was intended to create a similar obligation. And, in the absence of language similar to section 79 of *The Labour Relations Act*, it is equally difficult to find that this Board has a general remedial authority to rectify an alleged breach of the duty of fair representation.

10. Having regard to the scheme of the Act as a whole, we are satisfied that *The School Boards and Teachers Collective Negotiations Act* neither imposes a statutory duty of fair representation, nor gives this Board the jurisdiction to enquire into such matters. Accordingly, this application must be dismissed.

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**1190-80-R United Steelworkers of America, Applicant, v. Sling-Choker Manufacturing Limited, Respondent, v. Group of Employees, Objectors**

**Practice and Procedure – Representation Vote – Employer unlawfully refusing to continue employment of employee – Whether employee eligible to vote – Whether employee transferred out of bargaining unit prior to vote date eligible to vote**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and M. A. Ross.

**APPEARANCES:** *Norman Carriere for the applicant; Lloyd J. Valin, Q.C. and Paul Villgren for the respondent; Steve D. Horton for the objectors.*

**DECISION OF THE BOARD;** January 9, 1981

1. By decision dated October 10, 1980, another panel of this Board directed that a representation vote be taken of the employees of the respondent in the following bargaining unit:

“All employees of the respondent company in Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”

In ordering the representation vote, the Board made its normal direction respecting voter eligibility:

“All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.”

2. Pursuant to that direction, a vote was conducted by Returning Officer J. Bright on November 18, 1980 at the respondent's plant in Sudbury. Of the eight ballots cast, three were segregated as a result of challenges with respect to eligibility to vote and the ballot box was sealed at the direction of the Returning Officer.



3. By decision dated November 28, 1980, the aforementioned panel of the Board directed "that this matter be set down for continuation of hearing in order to hear the evidence and representations of the parties as to whether the segregated ballots cast by Rheal Laverdiere, Stanley Terava and Roger Perreault in the representation vote taken on November 18, 1980 should be counted".

4. Pursuant to that direction, a hearing was held by this panel of the Board in Sudbury on December 15, 1980. At the commencement at that hearing, the parties advised the Board that they had agreed that the ballot of Rheal Laverdiere should be counted. Having regard to the agreement of the parties, the Board rules that the segregated ballot cast by Rheal Laverdiere is to be counted.

5. By decision dated January 9, 1981 in Board File No. 1524-80-U, the Board found that the respondent had refused to continue to employ Roger Perreault contrary to *The Labour Relations Act* and directed the respondent to reinstate Mr. Perrault with full compensation for all lost wages and benefits. Where an employer is found by the Board to have refused to continue to employ an employee contrary to the Act and is directed to reinstate that employee with full compensation, that employee is entitled on reinstatement to all accrued benefits, including the right to participate in a representation vote concerning the bargaining unit of which he is a part (see *Brayshaws Steel Limited*, [1970] OLRB Rep. June 278). Accordingly, the Board rules that the segregated ballot cast by Roger Perrault is to be counted.

6. Stanley Terava, who had been employed by the respondent at its Sudbury plant (to which the instant application pertains) as a splicer and relief shipper-receiver since January of 1980, was transferred to the respondent's plant in Elliot Lake on September 7, 1980. He was transferred back to the Sudbury plant on September 28, 1980 and continued to work there until October 27, 1980 when he was again transferred to the Elliot Lake plant where he was employed on the date of the vote. He was still working at the Elliot Lake plant on the date of the continuation of hearing (December 15, 1980). Counsel for the respondent indicated that his client plans to keep Mr. Terava in Elliot Lake indefinitely but would transfer him back to Sudbury "if eventually [it] can hire a splicer for Elliot Lake".

7. The manner in which the Board has consistently interpreted its standard direction concerning eligibility to vote is set forth in *Canadian Westinghouse Company, Limited*, [1966] OLRB Rep. Sept. 372 at paragraph 6:

"The Board's standard direction for the taking of a representation vote, as quoted above, cites only two instances in which a person who was an employee in the bargaining unit on the date the vote was directed forfeits his eligibility to vote, namely, where he voluntarily terminates his employment or is discharged for cause before the date the vote is taken. The Board, however, has not attempted in its standard direction to define exhaustively all of the contingencies under which a person who was an employee in the bargaining unit when the vote was directed would cease to be eligible to vote. *The Board has consistently interpreted its direction to mean that a person who, between the date of the direction and the date of the vote, has ceased to be a member of the bargaining unit, is disqualified from participating in the vote, whether because of voluntary*

*termination of employment, discharge for cause, indefinite lay-off in some circumstances, or transfer to a position out of the bargaining unit. Stated another way, the policy of the Board is that a person must be an employee in the bargaining unit both on the date the vote is directed and on the date of the taking of the vote in order to be eligible to cast a ballot. . . .*" [emphasis added]

Accordingly, the Board held in that case that a person who had been an employee in the bargaining unit on the date the vote was directed but who had been transferred out of the bargaining unit prior to the taking of the vote, was ineligible to vote. (See also *The Regional Municipality of Durham*, [1980] OLRB Rep. Jan. 90 and *Success Display Limited*, [1971] OLRB Rep. Oct. 636.)

8. Thus, to be eligible to vote under the Board's direction respecting voter eligibility quoted above, a person must have been employed in the bargaining unit both on the date the vote was ordered and on the date the vote was taken. One of the reasons for this two pronged-rule is to ensure that insofar as possible, the vote will reflect the wishes of the employees with the most direct interest in its outcome — namely, the employees who are in the bargaining unit at the time the vote is taken (see *Trenton Memorial Hospital*, [1980] OLRB Rep. May 805, at paragraph 8).

9. Although Mr. Terava was employed in the bargaining unit on the date the vote was directed (October 10, 1980) he was not employed in the bargaining unit on the date the vote was taken (November 18, 1980) as, prior to the latter date, he had been transferred out of the bargaining unit for an indefinite period. Accordingly, the Board rules that the segregated ballot cast by Stanley Terava is not to be counted.

10. The Board therefore directs that all of the ballots cast at the representation vote be counted, with the exception of that cast by Stanley Terava which is not to be counted.

11. The matter is referred to the Registrar.

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**1354-80-U Ontario Public Service Employees Union, Applicant, v. R. B. McAusland, W. G. Docherty, G. M. Zubyk and St. Clair College of Applied Arts & Technology, Respondents**

**Consent to Prosecute – *Colleges Collective Bargaining Act* – Prior Board decision finding person to be “employee” – Employer changing duties of person before issuance of Board decision – Whether violation of declaration – Whether prosecution appropriate**

**BEFORE:** M. Mitchnick, Vice-Chairman, and Board Members C. G. Bourne and D. B. Archer.

**APPEARANCES:** *W. A. Lokay, J. Pflanzner, J. Miko and R. Hebdon for the applicant; Janice Baker and G. M. Zubyk for the respondents.*

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER C. G. BOURNE; January 26, 1981**

1. This is an application for consent to institute a prosecution. The applicant alleges that the respondents have acted in violation of sections 76(1), 76(2) and 90(3) of *The Colleges Collective Bargaining Act*.

2. The background to the application was a request by the applicant in early 1979 that the Ontario Labour Relations Board determine the employment status of a number of individuals at the College, pursuant to section 82 of *The Colleges Collective Bargaining Act*. The Labour Relations Officer's hearings on the section 82 application began around May of 1979, and the Board's decision issued on July 28, 1980. Two of the persons ruled upon, and included by the Board in the bargaining unit, were the Office Manager, Anne Bennett, and the Personnel and Payroll Clerk, Elaine Labbee.

3. Approximately a month prior to the issuance of the Board's decision, the College posted for a new job position entitled “Business Administrator”. The evidence of Jill Pflanzner, the President of the Local, is that, upon reading the description of the posting, she thought: “That's Anne Bennett's job”. She testified further that she felt no need to approach the College about it because at that point the section 82 decision had not been issued, and because she did not consider it unusual for the College to upgrade individual's jobs from time to time to reflect what they had actually been doing. She did not expect anyone else in the College to apply for the posted position, and in fact no one did.

4. The Board's decision was received by both the College and Mrs. Pflanzner about August 5th. Mrs. Pflanzner at that point waited to hear from the College with regard to implementation for those whom the Board had included in the bargaining unit. On August 20th, Mrs. Zubyk, the College's Director, Personnel Services, asked to meet with Mrs. Pflanzner. A number of things were discussed: among them, the Board's decision. Mrs. Zubyk indicated that neither Mrs. Bennett nor Mrs. Labbee would be included in the unit. Mrs. Pflanzner testified that Mrs. Zubyk said Mrs. Bennett's duties had changed, while Mrs. Zubyk testified she stated that a new excluded position had opened up, and Mrs. Bennett would likely be the successful candidate. As for Mrs. Labbee, Mrs. Pflanzner testified that Mrs. Zubyk stated that Mrs. Labbee was excluded under Appendix I of the collective agreement, and that she would



not be included in the unit until the agreement were changed. Mrs. Zubyk agrees that she said this, but testified she also mentioned there had been changes in Mrs. Labbee's duties as well.

5. On September 9th Mrs. Zubyk was at the Labour Board in connection with the applicant's application for consent to prosecute Cambrian College, and heard the applicant state that "St. Clair was next". Mrs. Zubyk then sent to Mrs. Pflanzner the following letter:

This is further to our discussion on August 20, 1980. As I mentioned, the secretarial position formerly occupied by Ms. Anne Bennett has been eliminated. Should the secretarial position be activated in the future, it will be in the support staff bargaining unit. As you know, Ms. Bennett was the successful applicant for the position Business Administrator posted July 22, 1980.

The position of Personnel Clerk remains active. Since my appointment as Director, Personnel Services on June 9, 1980, I have found it necessary to change the responsibilities of that position. Ms. Labbee reports directly to me and now has significantly more involvement in various facets of the Personnel Function. It is our opinion that the position should be excluded. If the union does not agree, we will file an application under section 82 of *The Colleges Collective Bargaining Act*.

As can be seen, reference is made in the letter to changes in the duties of Mrs. Labbee, but no mention is made of Mrs. Zubyk's reliance on Appendix I of the collective agreement.

6. Appendix I appears on its face to list a number of classifications excluded from the scope of the collective agreement. The agreement is in fact a "master" agreement covering all of the Colleges, and is bargained between the applicant and the Ontario College of Regents. One of the classifications stated as an exclusion in Appendix I is "Payroll and Personnel Clerk". That is the title held by Ms. Labbee at St. Clair. Mrs. Zubyk previously worked for the Ministry (until June 30, 1980), and was one of the management team who negotiated and signed the present collective agreement. Even prior to her involvement at St. Clair, she had made it clear to the applicant that a section 82 determination would not affect the determinations excluded by agreement under Appendix I.

7. The applicant called evidence to outline for the Board the history of the Appendix I exclusions. The evidence disclosed that Appendix I appeared in its present form in the very first collective agreement negotiated for the Colleges, in 1969, and was established in conjunction with the Report of the Little Commission. At that time there was no provision such as the present section 82 of *The Colleges Collective Bargaining Act* to determine disputes over status. The applicant's evidence was that it should have done something with Appendix I when the present Act was passed in 1975, but since there was no problem over it, it never became a priority item. It is the applicant's position that the passage of the Act in 1975 made Appendix I redundant, and in fact null and void, as it appears to be conflict with the express grounds for exclusions now set out in Schedules I and II of the Act. The applicant argues further that the Appendix has no useful meaning, since it only sets out job titles as they existed in 1969, and that the actual *duties* may have change substantially, and may vary from college to college. The respondent, as noted however, does not share the applicant's view of Appendix I. Mrs.

Zubyk, in particular, has always felt that effect must be given to the words which continue to be contained in Appendix I of the agreement.

8. In the case of Mrs. Bennett, the respondent called evidence to explain the major re-organization which has occurred in the College's Department of Continuing Education, together with the lack of adequate auditing procedures which led to the creation of the position which it entitled "Business Administrator". The applicant counters with the argument that the "new" job is not materially different from what Mrs. Bennett was already doing (and as already examined by the Board in the section 82 proceeding). As evidence of this the applicant points to the reaction of Mrs. Pflanzner when she saw the posted job description, the fact that no one else in the College bothered to apply for the posting, and the fact that Mrs. Bennett's "old" position has not been filled. On this last point, the evidence of Dr. Giroux, the overall head of the Department, and Mrs. Zubyk conflicts. Both agree that plans to fill the position had to be suspended because of restrictions on overall staff complement. But Dr. Giroux testified that the position definitely remained on the priority list; Mrs. Zubyk testified that it did not.

9. The events contained in this application, together with the applicant's recent experience as set out in the *Cambrian College* decision of October 6, 1980, Board File No. 0857-80-U (unreported) have raised in the applicant a concern that its section 82 determinations are being and will continue to be deliberately undermined. The applicant makes no secret of the fact that it is looking to consent to prosecute as a means by which the results of a section 82 application can, in effect, be "safeguarded". Proceedings under section 82 are often unavoidably lengthy and expensive, and the Board is by no means unsympathetic to the applicant's concerns. It is important, however, to bear in mind the limitations of the particular section of *The Colleges Collective Bargaining Act* we are dealing with.

10. To begin with, the Board's decisions under section 82 (just as with section 95(2) of *The Labour Relations Act*) are declaratory only. The declaration informs the parties to a collective bargaining relationship that the person occupying a particular classification is or is not an "employee" within the meaning of *The Colleges Collective Bargaining Act*, on the basis of the duties and responsibilities of that person on the date the application is filed. The inquiry must, of course, be limited to this fixed point in time in order to permit the parties to assess each other's position before proceeding to the Board, and to maintain a point of reference for relevant evidence as the hearings progress. The practical effect of this, however, is that, depending upon the complexity of the case, there can be a considerable gap in time between the filing of the application (the reference point of the Board's inquiry) and the actual decision of the Board. There is, in the meantime, nothing inherent in the section 82 process itself which requires that the structure of the organization under examination remain static. The employer remains free at any time, either before the Board's decision is rendered or after, to make such *bona fide* changes to its organization as the demands of the operation may require, even though these changes may materially affect the very classification which forms the subject of the application before the Board. If in this process the duties and responsibilities of that particular classification are materially altered, it follows that the Board's section 82 declaration, based on the duties and responsibilities as they existed at an earlier point in time, will no longer be determinative of the "employee" status of the person in question.

11. Where, then, does this right of the employer leave the trade-union partner to the collective bargaining relationship who, after perhaps many months in pursuit of a section 82

determination, finds itself standing uncomfortably on the sidelines as the employer re-shuffles his organization? Does the section 82 declaration the trade union ultimately achieves have any effect at all? Clearly it must – and does, in a number of ways.

12. The declaration may, of course, have retroactive effect in the sense of feeding back into a grievance previously filed. But beyond this, it articulates the duties as they existed at a given point in time, and lets the parties know, based on those duties and responsibilities, whether the position is within or without the coverage of the Act. In so doing, the Board's decision provides a clearly-defined backdrop against which subsequent "changes" can be measured, and their materiality determined.

13. Section 90(3) of *The Colleges Collective Bargaining Act* makes specific reference to a "declaration", and provides as follows:

The contravention of a decision, order, determination, direction, *declaration* or ruling made under this Act is deemed for the purposes of this section, to be a contravention of this Act. (emphasis added)

Clearly then, it must be possible to have a "contravention" of a "declaration". Such contravention presumably would lie in conduct which refuses to give effect to the Board's decision, in the absence of any legal justification. But does the employer have to be ultimately correct in the legal justification upon which it relies, or is it sufficient that the employer had an honest belief that he was correct?

14. There is nothing in the wording of section 90(3) which suggest that "intent" is a necessary ingredient in establishing a contravention of the section. In terms of a contravention of the section itself, therefore, it would appear that the employer must be correct in the position he has taken, or his "defence" fails. From an industrial relations point of view, however, it would appear to be a rare case where the Board would grant consent to prosecute, as an appropriate remedy, where it finds the employer has acted on a good faith belief that his position was justified. The apparent degree of merit in an employer's position would normally, therefore, on an application for consent to prosecute, only be material to the Board insofar as it evidences the presence or absence of good faith (cf. *Cambrian College, supra*, at paragraph 4).

15. In the Board's view, whether an employer has in fact contravened section 90(3) in refusing to place an employee in the bargaining unit can more appropriately be determined through a complaint under section 78(1)(a) that a person "has been . . . dealt with contrary to this Act as to his . . . conditions of employment". Particularly where the defence relied upon is that the person in dispute is no longer an "employee" within the meaning of the Act, the ultimate resolution of that issue appears appropriately to be a matter for the Board, rather than the Courts. Section 1(1)(vi) of the Act, for example, excludes a person who:

(vi) is not otherwise described in subclauses i to v but who, *in the opinion of the Ontario Labour Relations Board* should not be included in a bargaining unit by reason of his duties and responsibilities to the employer. (emphasis added)

Such a complaint can, where necessary, contain a request that the Board make a further deter-



mination of the individual's status, pursuant to the provisions of section 82 of the Act. If the trade union is also alleging "bad faith", that is, that the purported changes or defence relied upon by the employer are frivolous, or have no legitimate business purpose, obviously sections 76(1) and 76(2), as here, may be raised as well. Having these issues determined, at least initially, through the medium of a section 78 complaint allows the Board to fashion a remedy more appropriately related to the effects of the contravention, than the kind of remedy available through a prosecution.

16. The present application seeks consent to prosecute only, and, as indicated, in the Board's view depends upon an arguable case of bad faith being made out.

17. The case of Mrs. Labbee raises the difficult (and previously undecided) issue of the effect of Appendix I of the collective agreement. The Board has always recognized under section 95(2) of *The Labour Relations Act* that a person may be an "employee" for the purposes of the Act and yet be excluded from the coverage of a collective agreement, and the Board itself qualifies its appointments under this section to make that clear. The "legislated" bargaining units set out in Schedules I and II of *The Colleges Collective Bargaining Act*, however, raise a question as to whether the same is true of an application under section 82 of that Act. The answer to this question is by no means obvious, nor one in respect of which, in its present unresolved state, either party can accuse the other of bad faith in adopting its respective point of view. In the Board's view, this conclusion is sufficient to dispose of the application as it affects Mrs. Labbee.

18. While the Board has more concern over the case of Mrs. Bennett, its concern would be substantially greater had the job posting arisen *after* the Board's decision, or had Mrs. Zubyk not acted with reasonable promptness in alerting Mrs. Pflanzner to the problems that could be anticipated on implementation. It is clear that Mrs. Bennett's "new" job is not entirely so, but rather overlaps substantially with some of the duties she was performing as Office Manager. It is not surprising therefore, that the filling of the Office Manager position does not in fact appear to have been a priority for the respondent, nor that Mrs. Pflanzner, on the limited information available to her, equated the job posting to Mrs. Bennett's original job. Having regard, however, to the job descriptions filed for the two jobs, the facts disclosed by the Board's previous decision, and the business considerations articulated by Dr. Giroux, the Board is not persuaded that an arguable case of bad faith has been made out against the respondents. Once again, the Board finds this sufficient to cause it to dismiss the present application for consent to prosecute. This is not, it should be noted, an application under section 82 of the Act, and the Board does not have before it the direct evidence of the incumbent, Mrs. Bennett, as to the actual duties she is presently performing. The Board therefore makes no finding as to whether the person in dispute is or is not now an "employee" within the meaning of *The Colleges Collective Bargaining Act*.

19. The application is dismissed.

#### **DECISION OF BOARD MEMBER D. B. ARCHER:**

1. I agree with the facts as stated by the Chairman. I believe there is enough evidence to make an arguable case before the court, and should be considered by them. The court itself will decide whether or not it has jurisdiction and can be prescribe a remedy if one is necessary.

2. As suggested by the majority, there may have been better and more effective ways for the union to proceed; nevertheless, the union is entitled to choose its own procedure.

3. I believe the union has produced enough evidence for the Board to decide there is an issue that should be adjudicated and I would therefore allow the union leave to prosecute.

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**1408-80-M The Residential Low-Rise Forming Contractors Association of Metropolitan Toronto and Vicinity, Applicant, v. Labourers' International Union of North America, Local 183, Respondent, v. Teskey Construction Co. Ltd., Intervener**

**Construction Industry – Section 112a – Collective agreement requiring employers “bound by like agreement” to contribute to industry fund – Whether union violating agreement by signing different agreement with intervener employer – Whether applicant having relief against intervener**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**APPEARANCES:** *R. C. Fillion, A. Talvila, I. W. Mathews and R. Paganelli for the applicant; A. M. Minsky and L. Castaldo for the respondent; Susan Bisset, Brian Kelsall and Bert Humphries for the intervener.*

**DECISION OF THE BOARD;** January 13, 1981

1. This is a referral of a grievance to arbitration to the Labour Relations Board under section 112a of *The Labour Relations Act*. The grievance referred to the Board was filed by the applicant association by letter dated May 5, 1980, wherein the applicant association grieves that the respondent local trade union allegedly violated Article 16 of the agreement between the applicant association and the respondent trade union.

2. Article 16 of the collective agreement between the applicant and the respondent reads as follows:

**“ARTICLE 16 – INDUSTRY FUND**

16.01 Each Employer bound by this agreement or a like agreement, adopting in substance but not necessarily in form the terms and conditions herein, shall contribute two cents (2¢) per hour earned by each employee covered by this agreement or such like agreement and remit such contributions with the Welfare and Training Fund remittances payable to ‘Local 183 Trust Administration’ on or before the 15th day of the month following the month for which the contributions were due. Such amounts on receipt, together with a copy of the computer print-out indicating the total number of hours paid by each Employer, shall be

forwarded once per month to the Association by the Administrator of the 'Local 183 Trust Administration' as each Employer's contribution to the costs of negotiating and administering this agreement."

The thrust of the association's grievance is that by entering into a collective agreement with the intervener Teskey Construction Co. Ltd. containing the specific provisions of that agreement, the respondent trade union engaged in a continuing violation of the agreement between the association and the respondent.

3. There is no real dispute between the parties as to the facts which give rise to the present grievance. At the time of the execution of the recent collective agreement between the applicant association and the respondent trade union, the applicant was an employer's association composed of approximately 14 employers engaged in the construction of house basements. The intervener Teskey Construction Co. Ltd. is not now, nor has it ever been a member of the association. It is, however, engaged in the construction of house basements. The applicant association is not an accredited association under *The Labour Relations Act* nor has it applied to be accredited and, of course, it does not fall within the designation provisions of *The Labour Relations Act* either. The current collective agreement between the applicant and Local 183 of the Labourers' was signed on July 16, 1979 for a term commencing June 19, 1979 and expiring April 30, 1981. The previous collective agreement between the applicant and the respondent expired on April 30, 1979. The provision referred to above as Article 16.01 which set forth the requirement for an industry fund contribution in the collective agreement was added as a new provision to the current collective agreement between the association and Local 183. The intervener Teskey has had a bargaining relationship since May 1, 1978 with Local 183 when it entered into its initial collective agreement with Local 183; that collective agreement expired on April 30, 1979. By December, 1979, Teskey and Local 183 had not entered into a new collective agreement. Local 183 commenced a legal strike against Teskey as a result of Local 183's no-Board report concerning Teskey dated the 14th of May, 1979. That strike was accompanied by picketing activity. It was settled as a result of an arrangement referred to in a letter of December 14, 1979 to Mr. Minsky counsel for the respondent. The applicant is not a party to that agreement.

4. That letter reads as follows:

"Further to our telephone conversations of yesterday's date and my discussions with Mr. Castaldo over the past several [sic] days, this is to confirm the agreement which we have reached resolving all outstanding matters between the above-noted parties. The terms of the agreement to be drafted will be as follows:

1. Members of Local 183 will immediately cease any strike or picket action against my clients;
2. Teskey Construction Co. Ltd. will sign a collective agreement with Local 183 containing all the provisions currently included in the Collective Agreement between Local 183 and The Residential Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity subject to No. 3;



3. Commencing with the effective date of the current Collective Agreement between the above-noted Association and Local 183, the Company will pay the two cent (2¢) per man hour worked required under the Industry Fund provision of that agreement under the following conditions:
  - (a) The above monies will be paid into the trust for life of the current Collective Agreement between Local 183 and the Association
  - (b) If the Association successfully applies and receives an Accreditation Order under the provisions of *The Labour Relations Act* which Order covers the operations of the Company in the residential concrete forming field, the trust monies will be paid forthwith to the Association.
  - (c) If no such Order is received during the life of the current Collective Agreement, the said trust monies will be paid to a charity to be agreed upon between the parties."

5. Concerning the background facts, there is little to be added other than to point out that during the strike in July, 1979 which culminated in the current collective agreement between the applicant and the respondent, the intervener Teskey continued to work. Secondly, it is worth noting that the arrangement which Teskey accepted after several days of the strike in December of 1979, does not put Teskey in a preferred position as a competitor with the members of the association; that is, the wage cost per hour as a result of the respondent's agreement with Teskey is the same as the wage cost per hour resulting under the agreement between the applicant and the respondent.

6. The argument of the applicant in the present case is quite simple. It is a claim against the respondent trade union for violation of Article 16.01, and the argument of the association is that Teskey is party to "a like agreement adopting in substance but not necessarily in form the terms and conditions herein". Since Teskey is clearly bound by a like agreement, Teskey should be required to pay two cents per hour to the "industry fund", and in the event that Teskey fails to make such payment, the union becomes liable in place of the employer Teskey.

7. Counsel for the intervener argues that it is trite law that two parties to an agreement cannot bind a third party. This, however, misses the thrust of the applicant's argument which is in effect that the union by making the type of collective agreement that it made with Teskey was violating Article 16.01 in the agreement between the applicant and the respondent.

8. The respondent trade union takes the position that Article 16 of the agreement between the applicant and the respondent does not lend itself to the interpretation placed upon it by the applicant in this case. Put another way, the applicant's case becomes one of saying that by signing a similar but different collective agreement to the standard agreement between the union and the association, did the union violate Article 16 of the agreement? Clearly, Local 183 and the intervener Teskey are entitled to enter into a collective agreement and, in many respects, it is clear that the agreement entered into was not entered into in bad faith, in the sense that it is not a preferential collective agreement, but similar in its total wage cost to the

agreement between the applicant and the respondent. Further, it is clear that Article 16 of the agreement between the applicant and the respondent does not in itself bind Teskey. The question which remains is whether Article 16.01 binds the respondent trade union in this case to obtain a similar collective agreement from employers outside the association, such as Teskey. Clearly, the language of 16.01 recognizes the existence of collective agreements outside the standard association agreement, but it is not at all clear in the language that the union is bound to obtain such agreements nor is it clear that if the union obtains other agreements, *that the union itself* is liable for such a failure. Indeed, it is our view that if this was the intention of the parties in making Article 16.01, it could have clearly been spelled out. However, as it stands now, 16.01 merely refers to the obligation of an employer bound by a "like agreement". It does not refer to any liability by the respondent trade union in the event that it fails to obtain the obligation of an individual employer in Article 16.01.

9. For the foregoing reasons, it is obvious that the present grievance should be dismissed. However, before leaving this matter I should like to refer to a recent decision of this Board in *J. G. Rivard Limited*, [1980] OLRB Rep. July 1009. That is a case dealing with the failure of an individual employer to pay industry funds of a similar nature to those in issue in the present case. Clearly, however, in that case the employer's association trying to obtain payment of the industry fund stands as the statutory bargaining agent on behalf of the individual employer by virtue of section 134(2) of the Act. In those circumstances, the Board took the position that it would exercise a general supervisory rule with respect to the representation of employers, particularly, in the case of deviation from the "standard agreement". Unfortunately, for the association in the instant case it does not stand as bargaining agent for Teskey by virtue by either the provincial bargaining requirements of the Act or the accreditation requirements of the Act. There is, thus, no relief for the applicant against Teskey and as we have found earlier, given the language of Article 16.01, there is no relief against the respondent in this matter.

10. In view of the foregoing, this matter is dismissed.

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1980

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**2252-79-R:** Retail Clerks Union, Local 409, (Applicant) v. Metropol Security Limited, (Respondent).

Unit: "all employees of the respondent in the City of Thunder Bay other than those employed as guards protecting the property of employers, save and except supervisors, persons above the rank of supervisor and office staff." (162 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2443-79-R:** Hotel and Club Employees' Union, Local 299, Toronto, of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L. - C.I.O. - C.L.C.), (Applicant) v. Skyline Hotels Limited, (Respondent).

Unit: "all employees of the respondent at the Skyline Hotel, Dixon Road, Etobicoke, save and except supervisors, persons above the rank of supervisor, office and sales staff, accounting staff, security staff, front desk staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees covered under subsisting collective agreement." (371 employees in the unit).

**0176-80-R:** Ontario Association of Weight Counsellors, (Applicant) v. Weight Loss Inc., (Respondent).

Unit #1: "all employees of the respondent at London, save and except Clinic Director, persons above the rank of Clinic Director, office and sales staff and persons regularly employed for not more than 24 hours per week." (8 employees in the unit).

Unit #2: "all employees of the respondent at London, save and except Clinic Director, persons above the rank of Clinic Director, office and sales staff and persons regularly employed for not more than 24 hours per week." (4 employees in the unit).

**1277-80-R:** Cambridge Employees' Association (Applicant) v. Dan Hotel Company Limited, Taddy Hotel Company Limited and Gill Hotel Company operating under the name and style of Cambridge Motor Hotel, (Respondent) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union, (Intervener).

Unit: "all employees of the respondent working in or out of the Cambridge Motor Hotel in the Borough of Etobicoke in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and security staff." (156 employees in the unit). (*Having regard to the agreement of the applicant and the respondent*).

**1514-80-R:** Retail Clerks Union, Local 409, (Applicant) v. Blackwoods Beverages Limited, (Respondent).

Unit #1: "all employees of the respondent in the Town of Kenora, Ontario, save and except warehouse supervisor and persons above the rank of warehouse supervisor, sales persons, persons regularly employed for not more than twenty-four (24) hours per week and students employed for the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all sales persons employed by the respondent at the Town of Kenora save and except sales supervisor, persons above the rank of sales supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed for the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #3: "all employees of the respondent at Kenora regularly employed for not more than twenty-four (24) hours per week and students employed for the school vacation period save and except supervisors and persons above the rank of supervisors." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**1591-80-R:** International Association of Machinists & Aerospace Workers, (Applicant) v. City-Wide Scale Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at and out of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (8 employees in the unit). (*Having regard to the agreement of the parties*).

**1594-80-R:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Adidas (Canada) Limited, (Respondent).

Unit: "all employees of Adidas (Canada) Limited in the Municipality of Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office and sales staff." (16 employees in the unit).

**1612-80-R:** Teamsters Local Union 1000, Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. Union Pump (Canada) Ltd., (Respondent).

Unit: "all employees of the respondent working at Oakville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than twenty-four (24) hours per week." (10 employees in the unit). (*Having regard to the agreement of the parties*).

**1661-80-R:** International Union, United Automobile Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Tube-Lok Products Ltd., (Respondent), v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Woodstock, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (25 employees in the unit). (*Having regard to the agreement of the parties*).

**1642-80-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. G.H. Johnson's Furniture (Ottawa) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working at Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (11 employees in the unit).

**1674-80-R:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Burgess Wholesale (1978) Limited, (Respondent) v. Group of Employees, (Intervenors).

Unit: "all employees of the respondent at Newmarket, Ontario, save and except foremen, those above



the rank of foreman, office and sales staff, and students employed during the school vacation period.” (33 employees in the unit). (*Having regard to the agreement of the parties*).

**1717-80-R:** United Steelworkers of America, (Applicant) v. Canadian Oxygen Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Ottawa, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (9 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1723-80-R:** Service Employees International Union, Local 663 A.F. of L., C.I.O., C.L.C., (Applicant) v. Plainfield Children’s Home, (Respondent).

Unit: “all employees of the respondent in Plainfield, Ontario, save and except registered nurses, secretary to the Executive Director-Administrator, supervisors, persons above the rank of supervisor and persons covered by the subsisting collective agreement between the respondent and the Service Employees International Union, Local 183.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

**1726-80-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Spadco Construction Co. Ltd., (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Niagara and the County of Haldimand, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen.” (5 employees in the unit).

**1731-80-R:** Graphic Arts International Union, Local 542, (Applicant) v. Mercantile Press, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Brantford, save and except non-working foremen, persons above the rank of non-working foremen, office and sales personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (8 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1732-80-R:** Ontario Public Service Employees Union, (Applicant) v. Lamarre and Son Ambulance Service, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent employed in or out of the Counties of Prescott and Russell, Ontario, save and except owner-operator.” (7 employees in the unit). (*Having regard to the agreement of the parties*).

**1733-80-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant), v. Crane Canada Inc., Crane Supply Division, (Respondent).

Unit: “all employees of the respondent at London, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

**1745-80-R:** Canadian Paperworkers Union, (Applicant) v. SPB Canada (1979) Inc., (Respondent) v. Employee, (Objector).

Unit: “all office and clerical employees of the respondent in Belleville, save and except supervisors,

persons above the rank of supervisor, salesmen and sales trainees, secretary to the plant manager, industrial relations assistant, students employed during the school vacation period and persons covered by a subsisting collective agreement between the respondent and Canadian Paperworkers Union Local 1335." (9 employees in the unit).

**1764-80-R:** Sheet Metal Workers' International Association, Local Union 285, (Applicant) v. Tempo Heating and Air Conditioning Co. Ltd., (Respondent).

Unit: "all sheet metal workers and sheet metal apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in the unit).

**1767-80-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. B.B.S. Construction Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foreman." (5 employees in the unit).

**1770-80-R:** Graphic Arts International Union Local 211, (Applicant) v. Laird Graphics Limited, (Respondent).

Unit: "all lithographers, their apprentices and helpers in the employ of the respondent in Metropolitan Toronto, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

**1781-80-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. CB Carleton Restaurant Equipment Limited Supplies and Construction, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

**1782-80-R:** International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Paragon Drywall Systems, (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in the unit). (*Clarity Note*).

**1785-80-R:** Canadian Union of Public Employees, (Applicant) v. Muskoka Nursing Home, (Respondent).

Unit: "all employees of the respondent of Gravenhurst, Ontario, save and except administrator, professional medical staff, registered nurses, graduate nurses, director of nurses, office and clerical staff, supervisors, and persons above the rank of supervisor and students employed during the school vacation period." (80 employees in the unit). (*Clarity Note*).

**1787-80-R:** United Food and Commercial Workers International Union, Local 725, (Applicant) v. Title Stores Limited, (Respondent).

Unit #1: “all employees of the respondent in Napanee, Ontario, save and except the pharmacist, the store manager, persons above the rank of store manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in Napanee, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the pharmacist, the store manager, and persons above the rank of store manager.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

**1796-80-R:** International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Gulf Lathing Co., (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit). (*Clarity Note*).

**1818-80-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Dalv Construction Limited, (Respondent).

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**1819-80-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721, (Applicant) v. Feenal Construction Limited, (Respondent).

Unit: “all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all reinforcing rodmen in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**1822-80-R:** International Union of Operating Engineers, Local 796, (Applicant) v. Ottawa-Carleton Regional Hospital Food Services Inc. La Société des services alimentaires hospitaliers de la Régional d’Ottawa-Carleton Inc., (Respondent).

Unit: “all employees of the respondent in Ottawa, Ontario, save and except office staff, graduate dietitians, student dietitians, supervisors (department heads), persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (14 employees in the unit). (*Having regard to the agreement of the parties*).

**1843-80-R:** Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC, (Applicant) v. Amoco Fabrics Ltd., (Respondent).



Unit: "all employees of the respondent in Cornwall, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, industrial engineering personnel, guards, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (44 employees in the unit). (*Having regard to the agreement of the parties*).

**1856-80-R:** Ontario Nurses' Association, (Applicant) v. Extendicare Ltd./ North York, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by Extendicare Ltd./ North York, save and except Assistant Director of Nursing and those above the rank of Assistant Director of Nursing, and persons regularly employed for not more than twenty-four hours per week." (8 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses employed for not more than twenty-four hours per week in a nursing capacity by Extendicare Ltd./ North York, save and except the Assistant Director of Nursing and persons above the rank of Assistant Director of Nursing." (16 employees in the unit). (*Having regard to the agreement of the parties*).

**1872-80-R; 1873-80-R:** United Steelworkers of America, (Applicant) v. Crawford Metal Corporation, (Respondent).

Unit #1: "all office and clerical employees of the respondent in Burlington, Ontario, save and except supervisors, those above the rank of supervisor and sales staff." (5 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Burlington, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (2 employees in the unit). (*Having regard to the agreement of the parties*).

**1874-80-R:** Canadian Union of Public Employees, (Applicant) v. Algoma District Homes For the Ages - Sault Ste. Marie, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent at Sault Ste. Marie, Ontario, save and except supervisors and persons above the rank of supervisor, persons covered by subsisting collective agreements, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*).

**1881-80-R:** International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Pagani Brothers Lathing Co. Ltd. (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*Clarity Note*).

**1895-80-R:** United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic and Lathing and Insulation, Local 675, (Applicant) v. Paragon Drywall Systems, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen, and persons above the rank of non-working foreman." (21 employees in the unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama, and Mara) and the County of Durham (except the Township of Hope), but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (21 employees in the unit).

**1896-80-R:** United Brotherhood of carpenters and Joiners of America, Drywall, Acoustic, Lathing and Insulation, Local 675, (Applicant) v. Ekko Drywall Limited, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial, and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**1904-80-R:** Ottawa Typographical Union, Local 102, I.T.U., (Applicant) v. The Citizen, A Division of Southam Inc., (Respondent).

Unit: “all employees performing the function of inserting sections and supplements of the respondent’s newspaper employed in the City of Ottawa, Ontario, save and except foremen and those above the rank of foreman and persons regularly employed for not more than 24 hours per week.” (30 employees in the unit). (*Having regard to the agreement of the parties*).

**1919-80-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. George Pretli Construction, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**1933-80-R:** International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Major Lathing and Insulators Co. Ltd., (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (10 employees in the unit).

**1938-80-R:** International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Ekko Drywall Ltd. (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit). (*Clarity Note*).

**1946-80-R:** United Brotherhood of Carpenters and Joiners of America, Drywall, Acoustic, Lathing and Insulation, Local 675, (Applicant) v. Major Lathing and Insulation Co. Ltd., (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the

County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foreman and persons above the rank of non-working foreman.” (10 employees in the unit).

**1947-80-R:** United Brotherhood of Carpenters and Joiners of America, Drywall, Acoustic, Lathing and Insulation, Local 675, (Applicant) v. Gulf Lathing and Drywall Ltd., (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**1960-80-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Kast Engineering and Construction Ltd., (Respondent).

Unit: “all employees of the respondent in the County of Wentworth including part of the Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the maintaining and repairing of same, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

**2013-80-R:** International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. Nelmar Drywall Co. Ltd., (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foreman.” (5 employees in the unit). (*Clarity Note*).

## Applications Certified Subsequent to a Pre-Hearing Vote

**1268-80-R:** Service Employees Union, Local 204, Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Cambridge Memorial Hospital, (Respondent).

Unit: “all employees of the respondent in Cambridge, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, professional nursing staff, professional paramedical staff and their assistants, technical personnel and their assistants, office staff, supervisors, persons above the rank of supervisor, and persons covered by subsisting collective agreements.” (74 employees in the unit). (*Clarity Note*).

Number of names of persons on revised voter’s list		74
Number of persons who cast ballots		38
Number of ballots marked in favour of applicant	24	
Number of ballots marked against applicant	12	
Ballots segregated and not counted	2	

**1541-80-R; 1542-80-R:** London and District Service Workers’ Union Local 220, S.E.I.U., A.F.L., C.L.C., (Applicant) v. Chateau Gardens (Hanover) Inc., (Respondent).

Unit #1: (See Applications Dismissed Subsequent to a Pre-Hearing Vote)

Unit #2: “all employees of Chateau Gardens (Hanover) Inc., at Hanover save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, persons regularly employed for



not more than twenty-four hours per week, students employed during the school vacation period and office and clerical staff.” (37 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		37
Number of persons who cast ballots		35
Number of ballots marked in favour of applicant	18	
Number of ballots marked against applicant	17	

**1553-80-R:** Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. The Villa Private Hospital Limited, (Respondent).

Unit: “all employees of the respondent in the Town of Vaughan, save and except registered and graduate nurses, physiotherapists, occupational therapists, director of activities, office staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (78 employees in the unit).

Number of names of persons on list as originally prepared by employer		78
Number of persons who cast ballots		76
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	43	
Number of ballots marked against the applicant	28	
Ballots segregated and not counted	4	

**1569-80-R:** Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC, (Applicant) v. Ranger Products Company, Division of Rampro Inc., (Respondent).

Unit: “all employees of the respondent at its plant in Simcoe, save and except foremen, foreladies, persons above the rank of foreman, forelady, office, clerical and sales staff, persons employed regularly for not more than twenty-four (24) hours per week and students employed during the summer vacation period.” (81 employees in the unit).

Number of names of persons on list as originally prepared by employer		81
Number of persons who cast ballots		80
Number of ballots marked in favour of applicant	52	
Number of ballots marked against the applicant	28	

**1694-80-R:** Canadian Union of Operating Engineers & General Workers, (Applicant) v. The Salvation Army Grace General Hospital - and - International Union of Operating Engineers, Local 796, (Intervener).

Unit: “all stationary engineers and helpers in the employ of the respondent in Ottawa, Ontario.” (8 employees in the unit).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots		7
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	0	

**1702-80-R:** Christian Labour Association of Canada, (Applicant) v. The Salvation Army Grace Hospital, (Respondent) v. Canadian Union of Operating Engineers and General Workers, (Intervener).

Unit: “all engineers, mechanics, electrical and electronic technicians, apprentices and helpers employed by the Salvation Army Grace Hospital in Windsor, Ontario, save and except the Building Superinten-

dent, the Assistant Building Superintendent, employees regularly employed less than twenty-four (24) hours per week, students employed during the school summer vacation and employees covered by subsisting agreements.” (8 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots		8
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	0	

**1715-80-R:** Canadian Union of Operating Engineers and General Workers, (Applicant) v. Parry Sound District General Hospital, (Respondent) v. International Union of Operating Engineers, Local 796, (Intervener).

Unit: “all stationary engineers and persons primarily engaged as their helpers employed by the respondent in its boiler room at Parry Sound, Ontario, save and except chief engineers and persons above the rank of chief engineer.” (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots		5
Number of ballots marked in favour of the applicant	5	
Number of ballots marked in favour of the intervener	0	

**1769-80-R:** Graphic Arts International Union, Local 211, Toronto, Ontario, (Applicant) v. Lawson Packaging (A Division of Lawson Paper Converters Limited) - and - Printing Specialties & Paper Products Union - Local 466, (Intervener).

Unit: “all employees of the respondent, save and except foreman (not working foreman), those above the rank of foreman, office and clerical staff, sales and technical staff, and those employees who fall into the lithographers bargaining unit.” (139 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		139
Number of persons who cast ballots		126
Number of ballots marked in favour of applicant	65	
Number of ballots marked in favour of intervener	61	

### Applications Certified Subsequent to a Post-Hearing Vote

**1382-80-R:** Canadian Paperworkers Union, (Applicant) v. Somerville Belkin Industries Limited, Toronto Packaging Division, (Respondent) v. Printing Specialties & Paper Products Union, Local 466, (Intervener).

Unit: “all employees of the respondent at its plant at 188 Cartwright Avenue, save and except foremen, those above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period.” (173 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		170
Number of persons who cast ballots		139
Number of ballots marked in favour of applicant	89	
Number of ballots marked in favour of intervener	50	

**1391-80-R:** Service Employees Union, Local 214, affiliated with A.F. of L., C.I.O., (Applicant) v. The

Corporation of the County of Simcoe, Simcoe Manor Home for the Aged, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Beeton, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, director of activities, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (55 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		55
Number of persons who cast ballots		54
Number of ballots marked in favour of applicant	33	
Number of ballots marked against applicant	21	

**1440-80-R:** Canadian Paperworkers Union, (Applicant) v. Rolland Inc., (Respondent) v. Printing Specialties & Paper Products Union, Local 466, (Intervener).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto at 2131 Lawrence Avenue East, save and except foremen, persons above the rank of foreman, office and sales staff, lab staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period." (149 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		142
Number of persons who cast ballots		134
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	90	
Number of ballots marked in favour of intervener	42	

**1552-80-R:** Service Employees Union Local 204, affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Canada Catering Company Limited, (Respondent).

Unit: "all employees of the respondent employed at Thompson House in Metropolitan Toronto, Ontario, regularly employed for not more than twenty-four hours per week (24) and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, office staff and persons covered by subsisting collective agreement." (15 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots		11
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	0	

**1600-80-R:** Canadian Union of Public Employees, (Applicant) v. Capreol Bus Services, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Capreol, Ontario, regularly employed for not more than 24 hours per week, save and except manager and persons above the rank of manager, and office staff." (9 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots		9
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	4	



## APPLICATIONS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**1863-79-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Meaford Board of Parks Management (Lakeview Cemetery), (Respondent).

**0444-80-R:** United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Cross Canada Equipment, Cross Enterprises, Brad Cross, Cross Canada Service, Brad Cross Ltd., Sprucedale Texaco, (Respondents).

**1007-80-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Gamble Robinson, Limited, (Respondent) v. Group of Employees, (Objectors).

**1360-80-R:** Canadian Union of Restaurant and Related Employees, (Applicant) v. Granny's Fish and Chips Inc., (Respondent).

**1502-80-R:** Labourers' International Union of North America - Local 189, (Applicant) v. Bot Construction Ltd., (Respondent).

**1696-80-R:** Canadian Union of Public Employees, (Applicant) v. St. Joseph's General Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all lay paramedical employees of the respondent at Blind River, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, students in training, supervisors, charge technologists, persons above the rank of supervisor and charge technologist, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, persons presently represented by Canadian Union of Public Employees, Board Certificate dated February 25, 1980, File No. 2026-79-R, and persons covered by subsisting collective agreements with the Ontario Nurses' Association." (10 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1716-80-R:** Faultless-Doerner Mfg. Employees Association, (Applicant) v. Faultness-Doerner Manufacturing Inc., (Respondent) v. The Upholsterers' International Union of North America AFL-CIO, (Intervener).

**1734-80-R:** Labourers' International Union of North America, Local No. 506, (Applicant) v. Lido Plastering Company Limited, (Respondent).

**1783-80-R:** Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, (Applicant) v. Airtours Limited, (Respondent).

**1803-80-R:** District Lodge 717, International Association of Machinists and Aerospace Workers, (Applicant) v. Canada Valve Limited, (Respondent).

**1831-80-R:** Service Employees International Union, Local 183 A.F. of L., C.I.O., C.L.C., (Applicant) v. Village Green Nursing Home, (Respondent).

**1834-80-R:** Ontario Nurses' Association, (Applicant) v. The Etobicoke General Hospital, (Respondent).

**1876-80-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers: Local Union 304, (Applicant) v. The Municipality of the Corporation of Simcoe Road Department, (Respondent).

**1877-80-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers: Local Union 304, (Applicant) v. The Municipality of the Corporation of Simcoe Road Department, (Respondent).

**1923-80-R:** Canadian Paperworkers Union, (Applicant) v. Lily Cups Limited, (Respondent).

Unit: "all employees of the respondent at its plant at 300 Danforth Road, and 2121 Markham Road in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, product control personnel, office staff, and persons regularly employed for less than twenty-four hours per week." (417 employees in the unit).

### Certifications Dismissed Subsequent to a Pre-Hearing Vote

**0229-80-R:** Labourers' International Union of North America, Local 506, (Applicant) v. Phyform Construction Company Limited, (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Clarity Note*).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots		3
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener	2	

**0361-80-R:** Ontario Public Service Employees Union, (Applicant) v. Hôpital Montfort, (Respondent) v. Group of Employees, (Objectors).

Unit: "all paramedical employees of the respondent employed in the City of Ottawa, Ontario, save and except department heads, assistant department heads, persons above the ranks of department head and assistant department head and persons covered by subsisting collective agreements." (67 employees in the unit). (*Clarity Note*).

Number of names of persons on revised voters' list		69
Number of persons who cast ballots		61
Number of ballots marked in favour of applicant	25	
Number of ballots marked against applicant	36	

**1475-80-R:** Service Employees Union, Local 268, (Applicant) v. Sault Ste. Marie General Hospital, (Respondent) v. Ontario Public Service Employees Union, (Intervener) v. Group of Employees, (Objectors).

Unit #1: "all paramedical employees regularly employed by the respondent in Sault Ste. Marie, Ontario, the District of Algoma, save and except supervisors, Charge Technologists, Pharmacists, Dietitians, Students in training, office and clerical employees, persons employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (24 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all paramedical employees regularly employed by the respondent, in Sault Ste. Marie, Ontario, district of Algoma for not more than twenty-four hours per week, students employed during the school vacation period and persons not covered by subsisting collective agreements save and except supervisors, charge technologists, and persons above the rank of supervisor and charge technologists, Pharmacists, Dietitians, students in training, office and clerical employees." (8 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

*Bargaining Unit #1*

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	15	

*Bargaining Unit #2*

Number of names of persons on revised voters' list		7
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	4	

**1541-80-R; 1542-80-R:** London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.L.C., (Applicant) v. Chateau Gardens (Hanover) Inc., (Respondent).

Unit #1: "all employees of Chateau Gardens (Hanover) Inc., at Hanover who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff." (21 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		21
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	9	

Unit #2: (*See Applications Certified Subsequent to a Pre-Hearing Vote*)

**1650-80-R:** United Steelworkers of America, (Applicant) v. Stelpro Ltd., (Respondent).

Unit: "all employees of the respondent in Markham, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (34 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		42
Number of persons who cast ballots	26	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	24	

**1665-80-R:** Employees' Association of Milltronics, (Applicant) v. Milltronics Limited, (Respondent) v. United Electrical, Radio and Machine Workers of America, (UE), (Intervener).

Unit: "all employees of the respondent at Peterborough, Ontario, save and except foremen and persons above the rank of foreman, office and clerical employees, accounting staff, salesmen, professional engineers, product specialists, field service personnel and students." (71 employees in the unit). (*Having regard to the agreement of the parties*).



Number of names of persons on list as originally prepared by employer		93
Number of persons who cast ballots	74	
Number of ballots marked in favour of applicant	36	
Number of ballots marked in favour of intervener	35	
Ballots segregated and not counted	3	

**1695-80-R:** Canadian Union of Operating Engineers & General Workers, (Applicant) v. Ottawa Civic Hospital, (Respondent) v. International Union of Operating Engineers, Local 796, (Intervener).

Unit: "all operating engineers, firemen, oilers, plumbers, mechanics, fitters, electricians, machinists and all trainees in the employ of the respondent in its Department of Plant Operations and Maintenance." (37 employees in the unit). (*Having regard to the agreement of the parties*).

Number of persons on revised voters' list		37
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant	14	
Number of ballots marked in favour of intervener	19	

**1697-80-R:** International Union of Operating Engineers, Local 796, (Applicant) v. The Wellesley Hospital, (Respondent) v. Canadian Union of Operating Engineers & General Workers, (Intervener).

Unit: "all stationary engineers, hospital equipment maintenance men and helpers who work under these classifications employed by The Wellesley Hospital at its hospital in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office employees and those persons covered by a subsisting collective agreement between the Hospital and the Service Employees International Union, Local 204." (17 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant	8	
Number of ballots marked in favour of intervener	9	

## Certifications Dismissed Subsequent to a Post-Hearing Vote

**0359-80-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Warren Bitulithic Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	4	
Number of ballots marked against applicant	4	
Number of ballots marked in favour of applicant	0	

**0929-80-R:** United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Maple Lodge Farms Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical staff of the respondent in Norval, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (31 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		31
Number of persons who cast ballots	31	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	26	

**1417-80-R:** United Steelworkers of America, (Applicant) v. Jarvis Clark Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent company in North Bay, save and except foremen, supervisors, persons above the rank of foreman and supervisor, office, clerical and technical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (305 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		313
Number of persons who cast ballots	305	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	68	
Number of ballots marked against applicant	233	
Ballots segregated and not counted	1	

**1424-80-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Groom-Callaghan Supply Co. Ltd., (Respondent).

Unit: "all employees of the respondent at Sudbury, Ontario, save and except foremen and persons above the rank of foreman, office staff, outside sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (11 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		11
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against the applicant	6	

**1442-80-R:** The Canadian Union of Public Employees, (Applicant) v. Canada's Capital Building Services Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Cornwall, save and except supervisors and persons above the rank of supervisor." (52 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		50
Number of persons who cast ballots	46	
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	13	

**1671-80-R:** Brotherhood of Railway, Airline & Steamship Clerks Freight Handlers, Express & Station Employees, (Applicant) v. Finlay Travel Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors and those above the rank of supervisor." (8 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	8	

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1116-80-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Seeley & Arnill Construction Ltd., (Respondent).

**1202-80-R:** International Union of Electrical, Radio and Machine Workers, (Applicant) v. Grenada TV Rental Limited, (Respondent).

**1252-80-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Personalized Leasing Service Limited, operating under the Trade Names of Mac's Delivery Service, (Respondent).

**1326-80-R:** Bakery, Confectionery & Tobacco Workers International Union, Local 181, (Applicant) v. Silverstein's Bakery Limited, (Respondent).

**1675-80-R:** Teamsters, Local Union 1000, Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. Pepsi-Cola Bottling Company of Oshawa, (Pepsi-Cola Ltd.), (Respondent).

**1711-80-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721, (Applicant) v. Raney-Taxi, (Respondent).

**1755-80-R:** United Brotherhood of Carpenters and Joiners of America - Local Union 93, (Applicant) v. Bosman Building Systems (B.B.S.), (Respondent).

**1765-80-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Raney Taxi, (Respondent).

**1766-80-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Carling Foster Construction Ltd., (Respondent).

**1814-80-R:** Canadian Brotherhood of Railway, Transport and General Workers, (Applicant) v. Apex Skene Company, DeHaan Cartage Ltd., (Respondents).

**1832-80-R:** United Steelworkers of America, (Applicant) v. Exide Canada Inc., (Respondent).

**1833-80-R:** The United Brotherhood of Carpenters and Joiners of America, Local 3054, A.F.L. C.I.O. C.L.C., (Applicant) v. The Craftmen's Circle, (Respondent).

**1840-80-R:** Teamsters Union Local 938, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Hutchins Bros. Limited, (Respondent).

**1875-80-R:** Ontario Public Service Employees Union, (Applicant) v. Canadian Association for the Mentally Retarded, (Respondent).

**1905-80-R:** Canadian Union of Operating Engineers and General Workers, (Applicant) v. S. & W Management, (Respondent).

**1922-80-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers: Local Union 304, (Applicant) v. The Corporation of the County of Simcoe Roads Department, District No. 3, (Respondent).



**1927-80-R:** Energy and Chemical Workers Union, (Applicant) v. Medallion Plastics Limited, (Respondent).

**1983-80-R:** Labourers' International Union of North America - Local 183, (Applicant) v. Benfil Engineering & Const. Ltd., (Respondent).

**1989-80-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers; Local Union 304, (Applicant) v. The County of Simcoe, (Respondent).

**2011-80-R:** The Canadian Union of Public Employees, (Applicant) v. Casselman Nursing Home (Elsie Able Enterprises Limited), (Respondent).

**2037-80-R:** Canadian Paperworkers Union, (Applicant) v. J.H. McNairn Limited, (Respondent) v. Retail Clerks International Union Local 233F, (Intervener).

## APPLICATIONS UNDER SECTION 1(4)

**2181-79-R:** Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' Conference, Sheet Metal Workers' International Association, Local 269, (Applicants) v. Bourdeau Heating and Air Conditioning Limited, Planned Mechanical Services Limited and 427477 Ontario Limited, carrying on business as B.C. Mechanical, (Respondents). (*Granted*).

**0448-80-R:** Labourers' International Union of North America, Local 506, (Applicant) v. Trans-Nation Incorporated and Valentine Enterprises Contracting, (Respondents). (*Dismissed*).

**1579-80-R:** United Brotherhood of Carpenters and Joiners of America, Local 249 and Carpenters' District Council of Lake Ontario on behalf of Locals 397, 572, 1071 and 1450 of The United Brotherhood of Carpenters and Joiners of America, (Applicants) v. Hugh Murray (1974) Limited; and Trend Building Systems, owned and operated by 444758 Ontario Inc., (Respondents). (*Granted*).

**1603-80-R:** The International Brotherhood of Painters, and Allied Trades, Local 1824, (Applicant) v. Caledonia Painting and Decorating, Caledonian Hills Painting and Decorating Limited, E.M.R. Painting & Decorating Ltd. and Scot-Can Ltd., (Respondents). (*Granted*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**2432-79-R:** Homida Ali, (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Respondent) v. Ontario Hospital Association (Blue Cross), (Intervener).

Unit: "all office and clerical employees of The Ontario Hospital Association within the Municipality of Metropolitan Toronto, save and except sections heads, managers of co-ordinators, persons above the rank of section head, manager and co-ordinator, secretaries to those above the rank of supervisor, audio-visual staff, sales staff, communications staff, print shop staff, mail room clerks regularly assigned to reading mail, internal auditors, consultants, all employees in the Hospital Employee Relations Services Department (including personnel and payroll staff), all employees of the Investment Services Department, all employees of the Hospital Accident Prevention Department, systems analysts, programmers and all computer operations staff, maintenance engineers, pharmaceutical chemists, students employed during the school vacation periods and persons regularly employed for not more than twenty-four hours or less per week." (421 employees in the unit). (*Dismissed*).

**1241-80-R:** Vernon Gillespie, (Applicant) v. Labourers' International Union of North America, Local 837, (Respondent) v. Dynamic Circuits Corporation Limited and 418514 Ontario Limited carrying on business as Proto Circuits, (Intervener).

Unit: "all employees of Dynamic Circuits Corporation Limited and/or 418515 Ontario Limited, carrying on business as Proto Circuits, employed in the City of Hamilton, save and except foremen, persons above the rank of foreman, office sales and clerical staff, persons employed for less than twenty-four hours per week and students employed during the school vacation period." (20 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		19
Number of persons who case ballots	19	
Number of ballots marked in favour of the respondent	0	
Number of ballots marked against the respondent	18	

**1640-80-R:** Deirdre Biehn, Dolores Schertzbert, Janet Stevens, (Applicants), v. International Woodworkers of America, (Respondent) v. Evenflo, Division of Questor Commercial Inc., (Intervener). (3 employees in the unit). (*Dismissed*).

**1701-80-R:** Barbara Godkin, (Applicant) v. Toronto Typographical Union No. 91, (I.T.U.), (Respondent) v. Accutext Limited, (Intervener). (16 employees in the unit). (*Dismissed*).

**1725-80-R:** Vincent Banez, (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 195, (Respondent).

Unit: "all employees of Controlled System (Windsor) Ltd. in the county of Essex, save and except foremen, those above the rank of foreman, office and sales staff." (25 employees in the unit). (*Dismissed*).

**1727-80-R:** Bruce G. Watson, (Applicant) v. Teamsters Local 419, (Respondent). (30 employees in the unit). (*Withdrawn*).

**1758-80-R:** Laura F. Cochlin, (Applicant) v. United Cement, Lime & Gypsum Workers International Union, (Respondent). (17 employees in the unit). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

**1867-80-U:** John Wood Manufacturing Limited, (Applicant) v. Spiros Armenis et al, (Respondents). (*Withdrawn*).

**1993-80-U; 1994-70-U:** Maitland Redi-Mix Concrete Products Limited, (Applicant) v. Leonard Schultz, Matt Elliott and Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondents). (*Dismissed*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**0958-79-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. P.J. Wallbank Mfg. Company Ltd., (Respondent). (*Granted*).

**2099-79-U; 2139-79-U; 2140-79-U; 2216-79-U:** Hotel and Club Employees' Union, Local 299, Toronto, of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.I.O.-C.L.C.). (Applicant) v. Skyline Hotels Limited, (Respondent). (*Granted*).

**2246-79-U:** Mario Moreira, (Complainant) v. Labourers' International Union of North America, Local 506 and Labourers' International Union of North America, (Respondent) v. Ontario Hydro, (Intervener). (*Dismissed*).

**2275-79-U:** Angela Martin, (Complainant) v. Windsor Typographical Union #553, (Respondent) v. The Windsor Star, (Intervener). (*Dismissed*).

**0436-80-U:** Retail Clerk's Union, Local 409, (Complainant) v. Metropolitan Investigation & Security (Canada) Ltd., (Respondent). (*Withdrawn*).

**0610-80-U:** John M. DaSilva, (Complainant) v. National Dry Company Ltd., (Respondent) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers c/o Soft Drink Workers Joint Local Executive Board, (Intervener). (*Dismissed*).

**0915-80-U:** Canadian Union of Public Employees, (Complainant) v. The Corporation of the County of Brant Department of Social Services, (Respondent). (*Withdrawn*).

**1104-80-U:** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Remex (Canada) Limited, (Respondent). (*Withdrawn*).

**1108-80-U:** Clinton Francis Killeleagh, (Complainant) v. U.A.W. #458 - Brantford, (Respondent) v. Massey Ferguson Industries Ltd., (Intervener). (*Dismissed*).

**1126-80-U:** United Steelworkers of America, (Complainant) v. The Wind Turbine Company of Canada Limited, (Respondent). (*Withdrawn*).

**1135-80-U:** United Cement, Lime and Gypsum Workers International Union, (Complainant) v. Lesmith Limited, (Respondent). (*Withdrawn*).

**1499-80-U:** The Association of General Studies Teachers in Hebrew Day Schools, (Complainant) v. The Associated Hebrew Schools, (Respondent). (*Dismissed*).

**1587-80-U; 1588-80-U:** Christian Labour Association of Canada, (Complainant) v. Oxford Manor Rest Home, (Respondent). (*Dismissed*).

**1601-80-U:** Canadian Union of Public Employees, (Complainant) v. Case Manor Nursing Home, (Respondent). (*Withdrawn*).

**1627-80-U:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. The Resource Recovery Division of Browning-Ferris Industries Ltd., (Respondent). (*Withdrawn*).

**1643-80-U:** United Electrical, Radio and Machine Workers of America (UE), (Complainant) v. Rantex Brushes Inc., (Respondent). (*Withdrawn*).

**1682-80-U:** Canadian Union of Educational Workers, (Complainant) v. McMaster University, (Respondent). (*Withdrawn*).

**1692-80-U:** Ronald D. Pope, (Complainant) v. United Steel Workers of America, (Local 7607), (Respondent). (*Dismissed*).



**1703-80-U:** United Association of Journeymen and Apprentices of the Pipe Fitting Industry of the United States and Canada, Local 787, (Complainant) v. H.G. Francis and Sons Limited. (Respondent). (*Withdrawn*).

**1705-80-U:** William Egan, (Complainant) v. Larry Ambrose, (Respondent). (*Withdrawn*).

**1719-80-U:** Retail, Wholesale, and Department Store Union, AFL: CIO: CLC, (Complainant) v. Gamble Robinson Limited, (Respondent). (*Terminated*).

**1739-80-U:** Gordon H. Duffy, (Complainant) v. A P Parts of Canada Division of Questor Commercial Inc., (Respondent). (*Withdrawn*).

**1754-80-U:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. (Complainant) v. Crane Canada Limited, (Respondent). (*Withdrawn*).

**1775-80-U:** Retail Clerks Union, Local 409, (Complainant) v. Blackwoods Beverages, (Respondent). (*Withdrawn*).

**1777-80-U:** Hotels, Clubs, Restaurants and Tavern Employees' Union, Local 261, (Complainant) v. Frank Teshima, President Suisha Gardens Limited, (Respondent). (*Withdrawn*).

**1778-80-U:** Hotels, Clubs, Restaurants and Tavern Employees' Union, Local 261, (Complainant) v. Frank Teshima, President Suisha Gardens Limited, (Respondent). (*Withdrawn*).

**1779-80-U:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Complainant) v. Frank Teshima, President Suisha Gardens Limited, (Respondent). (*Withdrawn*).

**1808-80-U:** Canadian Union of Public Employees, (Complainant) v. Bloorview Children's Hospital, (Respondent). (*Withdrawn*).

**1809-80-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Bowes Company Limited, (Respondent). (*Withdrawn*).

**1828-80-U:** Ontario Public Service Employees, (Complainant) v. Lamarre and Son Ambulance Service, (Respondent). (*Withdrawn*).

**1835-80-U:** John Turner, (Complainant) v. United Transportation Union, (Respondent). (*Withdrawn*).

**1836-80-U:** William J. Little, (Complainant) v. United Food & Commercial Workers International Union Local P688/Black Diamond Cheese, (Respondents). (*Withdrawn*).

**1844-80-U:** Energy & Chemical Workers Union, (Complainant) v. Medallion Plastics Limited, (Respondent). (*Withdrawn*).

**1845-80-U:** United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Rantex Brushes Inc., (Respondent). (*Withdrawn*).

**1846-80-U:** Retail Clerks Union, Local 409, (Complainant) v. Blackwood Beverages Limited, (Respondent). (*Withdrawn*).

**1847-80-U:** Retail Clerks Union, Local 409, (Complainant) v. Blackwood Beverages Limited, (Respondent). (*Withdrawn*).

**1862-80-U:** Pasqualino Guglielmo, (Complainant) v. Amalgamated Clothing, (Respondent). (*Withdrawn*).

**1866-80-U:** John Wood Manufacturing Limited, (Complainant) v. Spiros Armenis et al, (Respondents). (*Withdrawn*).

**1868-80-U:** United Steelworkers of America, (Complainant) v. Baltimore Aircoil Interamerican Corporation, (Respondent). (*Withdrawn*).

**1871-80-U:** United Electrical, Radio and Machine Workers of America, (UE), (Complainant) v. Rantex Brushes Inc., (Respondent). (*Withdrawn*).

**1878-80-U:** Ontario Public Service Employees Union, (Complainant) v. The District of Halton and Mississauga Ambulance Service Ltd., (Respondent). (*Withdrawn*).

**1888-80-U:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Henshaw's Produce Ltd., (Respondent). (*Withdrawn*).

**1889-80-U:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Henshaw's Produce Ltd., (Respondent). (*Withdrawn*).

**1891-80-U:** St. Thomas Typographical Union, Local 459 (ITU), (Complainant) v. St. Thomas Times Journal, (Respondent). (*Withdrawn*).

**1892-80-U:** Galt Typographical Union Local 411 (ITU), (Complainant) v. The Cambridge Daily Reporter, (Respondent). (*Withdrawn*).

**1908-80-U:** Victor McFarlane, (Complainant) v. Compressed Metals Employees' Association, Harry Fowler, (Vice Pres.), (Respondent) (*Withdrawn*).

**1916-80-U:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Adidas (Canada) Limited, (Respondent). (*Withdrawn*).

**1924-80-U:** The Perth County Board of Education, (Complainant) v. The London & District Service Worker's Union, Local 220, (Respondent). (*Withdrawn*).

**1931-80-U:** Ontario Nurses' Association, (Complainant) v. Sunnybrook Hospital, (Respondent). (*Withdrawn*).

**1941-80-U:** Peter George, (Complainant) v. Babcock & Wilcox Canada Ltd. and United Steelworkers of America Local 2859, (Respondent). (*Withdrawn*).

**1965-80-U:** Retail Clerks Union, Local 409, (Complainant) v. Blackwood Beverages Limited, (Respondent). (*Withdrawn*).

**1977-80-U:** William James Stewart, (Complainant) v. Troybright Industries Ltd., (Respondent). (*Withdrawn*).

**2023-80-U:** Janice Burton and Henrietta Dwyer, (Complainant) v. Granny's Country Oven Bakery Limited and Granny's Country Oven Employees' Association, (Respondents). (*Withdrawn*).

## APPLICATIONS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**1669-80-OH:** George Vizino, (Complainant) v. Kwikasair Express and Alltrans Garage, (Respondent). (*Withdrawn*).

**1859-80-OH:** Alexander M Francis, (Complainant) v. Waffle's Electric Ltd., (Respondent). (*Withdrawn*).

## APPLICATIONS UNDER SECTION 55

**1887-79-R:** Union of Canadian Retail Employee's Local 1000A Chartered by the United Food and Commercial Workers International Union, (Applicant) v. Peter's Fantastic Foods Inc., (Respondent). (*Withdrawn*).

**2181-79-R:** Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' Conference, Sheet Metal Workers' International Association, Local 269, (Applicants) v. Bourdeau Heating and Air Conditioning Limited, Planned Mechanical Services Limited and 427477 Ontario Limited, carrying on business as B.C. Mechanical, (Respondents). (*Granted*).

**0447-80-R:** Labourers' International Union of North America, Local 506, (Applicant) v. Trans-Nation Incorporated, (Respondent) v. Valentine Enterprises Contracting, (Intervener). (*Dismissed*).

**1336-80-R:** International Beverage Dispensers' and Bartenders' Union, Local 280, (Applicant) v. 452390 Ontario Limited, carrying on business as the Stafford Hotel, (Respondent) v. Group of Objectors, (Objectors). (*Granted*).

**1603-80-R:** The International Brotherhood of Painters and Allied Trades, Local 1824, (Applicant) v. Caledonia Painting and Decorating Limited, E.M.R. Painting & Decorating Ltd., and Scot-Can Ltd., (Respondents). (*Granted*).

## JURISDICTIONAL DISPUTE

**0683-80-JD:** Mathews Conveyer Company, (Complainant) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 and Allan MacIssac, (Respondents). (*Withdrawn*).

**1290-80-JD:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853, (Complainant) v. Upper Lakes Shipping Limited, carrying on business under the Registered name and style of Canal Electric, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 666, (Respondents). (*Withdrawn*).

**1446-80-JD:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, (Complainant) v. Sutherland-Schultz Limited, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527, (Respondents). (*Withdrawn*).



## APPLICATIONS UNDER THE COLLEGES COLLECTIVE BARGAINING ACT 1975, SECTION 82

**0874-80-M:** Ontario Public Service Employees Union, (Applicant) v. Cambrian College of Applied Arts and Technology, (Respondent). (*Terminated*).

**1689-80-M:** Ontario Public Service Employees Union, (Applicant) v. Cambrian College of Applied Arts and Technology, (Respondent). (*Terminated*).

## APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

**0276-80-M:** Canadian Union of Public Employees, Local Union No. 101, (Applicant) v. The Corporation of the City of London, (Respondent). (*Denied*).

**1199-80-M:** Max Factor Canada, (Employer) v. United Steelworkers of America, (Trade Union). (*Withdrawn*).

**1688-80-M:** Cochrane Temiskaming Resource Centre, (Employer) v. Ontario Public Service Employees Union, (Trade Union). (*Withdrawn*).

## REFERENCES TO BOARD PURSUANT TO SECTION 96

**1797-80-M:** UOP Products Limited - Flexonics Division, (Employer) v. Sheet Metal Workers International Association, Local Union #540, (Trade Union). (*Terminated*).

## APPLICATIONS UNDER SECTION 112(a)

**0503-80-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Trans-Nation Incorporated and Valentine Enterprises Contracting, (Respondents). (*Dismissed*).

**1087-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. M.B.L. International Contractors Inc., (Respondent). (*Withdrawn*).

**1197-80-M:** International Union of Operating Engineers, Local 793, (Applicant), v. Aztec Contractors Ltd., (Respondent). (*Withdrawn*).

**1461-80-M:** A Council of Trade Unions Acting as the Representative of: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 880 and Labourers' International Union of North America, Local 625-749 and International Union of Operating Engineers, Local 793, (Applicant) v. Dunlins Contractors Limited, Almega Contractors & Engineers Inc. and Almega Dunlins Limited, (Respondents). (*Withdrawn*).

**1556-80-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Norland Construction Ltd., (Respondent). (*Withdrawn*).

**1747-80-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67 and Don MacDonald, Nelson Miehm, John Cummings, Joseph Jarvis & William Vanderschee, (Applicants) v. Aldershot Industrial Installations Limited, (Respondent). (*Granted*).

**1756-80-M:** The Sheet Metal Workers International Association Local Union #562, (Applicant) v. Brathwaite Roofing Limited, (Respondent). (*Withdrawn*).

**1760-80-M:** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 736, (Applicant) v. Pro Steel Erectors Limited, (Respondent). (*Granted*).

**1761-80-M:** Labourers' International Union of North America, Local 493, (Applicant) v. Fernet Construction Co. Ltd., (Respondent). (*Granted*).

**1810-80-M:** Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Tantalus Construction Ltd., (Respondent). (*Withdrawn*).

**1811-80-M:** Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Fapp-Co Contractors Ltd., (Respondent). (*Withdrawn*).

**1815-80-M:** Labourers' International Union of North America - Local 183, (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and Star-Wall Concrete Forming Ltd., (Respondents). (*Withdrawn*).

**1816-80-M:** Labourers' International Union of North America - Local 183, (Applicant) v. The Residential Low-Rise Forming Contractors' Association of Metropolitan Toronto and Vicinity and Appia Construction Ltd., (Respondents). (*Withdrawn*).

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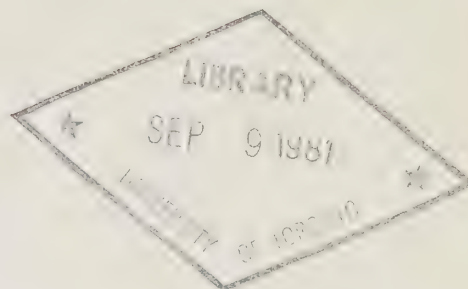
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A Monthly Series of Decisions from the  
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Selected decisions of particular reference value are  
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**1452-79-R** Christian Labour Association of Canada, Applicant, v. Al Smith Plastering & Partition Co. Limited and Barrie Plastering, Drywall & Acoustics Co. Limited, Respondents, v. Carpenters District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, Intervener.

**Bargaining Rights – Related Employer – Application for declaration of related employer filed after bargaining rights for second company obtained by intervener union – Whether Board revoking intervener's bargaining rights – Whether Board issuing declaration**

**BEFORE:** Rory F. Egan, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** William R. Herridge, Q.C., Elizabeth J. Forster, E. Vanderkloet and John Adema for the applicant; Michael Gordon and Al Smith for the respondents; Douglas J. Wray and Torrance J. Ferrier for the intervener.

**DECISION OF THE BOARD;** February 6, 1981

1. This is an application under subsection 4 of section 1 of *The Labour Relations Act* in which the applicant seeks a declaration that Al Smith Plastering & Partition Co. Limited (hereinafter referred to as "Al Smith") and Barrie Plastering, Drywall & Acoustics Co. Limited (hereinafter referred to as "Barrie") constitute one employer for the purposes of the Act and that they are bound by a collective agreement made between the applicant and Al Smith dated July 26, 1977, and effective from August 1, 1977 to July 31, 1979, and by memorandum of agreement between the same dated October 3, 1979, and effective from August 1, 1979 to April 30, 1982.

2. Section 1(4) of *The Labour Relations Act* provides:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

3. The intervener submits that the applicant is not entitled to the relief claimed on the grounds that to grant it would substantially affect bargaining rights which it says exist between the respondent, Barrie, and the intervener. The intervener submits that these bargaining rights are evidenced by a collective agreement dated July 20, 1979, and the Carpenters Provincial Agreement.

4. The intervener further submits that the Board ought not to exercise its discretion pursuant to section 1(4) to grant the relief requested by the applicant.

5. Al Smith was incorporated on January 16, 1967. Barrie was incorporated on December 11, 1969. It is beyond dispute, having regard to the documentary evidence and the testimony of Mr. Al Smith, that the two corporations are associated or related activities or businesses in the construction field that they are carried on under common control and direction exercised by Mr. Al Smith.

6. The question remains as to how the Board, in the circumstances dealt with below, ought to exercise its discretion under the provisions of section 1(4) of the Act.

7. The applicant had been certified as bargaining agent for employees of Al Smith in Board areas 18, 28 and 7 in the years 1973, 1975 and 1975 respectively and at the date of the application, was bargaining agent for the employees of Al Smith under a collective agreement dated October 3, 1979 covering the relevant areas.

8. The applicant was at no time certified as bargaining agent for employees of Barrie and no collective agreement has been made between the applicant and Barrie. The evidence of the respondent is that the "Al Smith" company was used on what were referred to as "union jobs" in the construction area while the "Barrie" company was used where it was seen that the work could be performed without the use of unionized employees. Barrie was used on small jobs, employing mostly people recruited in the area where the job was being performed.

9. Employees of Al Smith, however, sometimes worked for Barrie. When they did, they were paid in accordance with the Al Smith collective agreement with CLAC. Persons who were not Al Smith employees would work beside the former on Barrie non-union jobs but would not necessarily be paid the same CLAC rates as those transferred from Al Smith.

10. Barrie did not retain year-round employees but it served the purpose of providing some employment for persons normally employed by Al Smith at times when no work was available for that company.

11. The present application has its roots in the fact that Al Smith made a successful bid on a subcontract job at Georgian College of Applied Arts and Technology in Orillia involving acoustic drywall and plaster work. The general contractor who awarded the contract was C. A. Smith Contracting Limited of Markham, Ontario. Despite the similarity of names, there is no connection between the general and the subcontractor except that arising out of the transaction with which we are dealing. Sometime in November 1978 C. A. Smith forwarded a contract for signature by Al Smith covering the work to be done at Georgian College.

12. At that time and at all material times, the general contractor was bound by the Carpenters Provincial Agreement. This agreement provides that if a company, bound by the Provincial Agreement, subcontracts any carpenters' work, it must do so only with a company bound by a collective agreement with the Carpenters.

13. The contract sent by C. A. Smith Contracting Limited to Al Smith contains a clause stipulating that the subcontractor will employ employees with union affiliation compatible with the conditions under which the contractor is carrying on his contract with the owner.

14. On February 14, 1979, C. A. Smith Contracting Limited wrote to Al Smith requesting the latter to send in the executed contracts. The letter contained a paragraph in



which the general contractor requested Al Smith to confirm that his company was “a member in good standing with the local carpenters union”.

15. On April 23, 1979, the general contractor again wrote to Al Smith advising that unless the contracts were executed and returned by April 30, 1979, the contract would be awarded to another contractor.

16. Under cover of June 7, 1979, Al Smith returned a signed and sealed copy of the contract to the general contractor. This brought a reply dated June 11th in which the general contractor stated that it was unable to execute the contract “due to the fact that your workmen are not members of Local 1617 of the carpenters union or affiliates thereto”. The letter concludes with a reference to the clause in the contract referred to above.

17. This brought a letter from Al Smith’s solicitors to C. A. Smith advising the latter that they were instructed to take all necessary action in the event that Al Smith were not permitted to perform the work.

18. The next significant correspondence was a letter from C. A. Smith, the general contractor, addressed to Al Smith but containing a contract between the general contractor and Barrie. The accompanying letter dated July 3, 1979 states that the contract is identical to that formerly issued to Al Smith but with a reduction on the monetary consideration. The latter fact has no bearing on this matter.

19. Sometime in July Mr. Al Smith executed the contract on behalf of Barrie. The contract is dated November 14, 1978. Smith could not remember the date upon which he executed the contract but it would obviously be after July 3, 1979. The completed contract was then returned to Barrie under covering letter dated July 19, 1979, after which Barrie commenced to work on the Georgian College project under the collective agreement between the intervener and Barrie referred to earlier as the basis for the intervention in this application.

20. The substitution of Barrie as the subcontractor was brought about not only through the refusal of the contractor to sign the contract with a firm which could not meet the union affiliation clause of the contract but also through the insistence of the United Brotherhood of Carpenters that the general contractor comply with the provisions of the collective agreement between the latter and the carpenters’ union.

21. Asked when he first became aware of a problem with the general contractor concerning the United Brotherhood of Carpenters involvement, Smith testified that he had heard only rumours of this prior to May 3, 1979. On that date Torrance Ferrier, Business Representative of Local 2480 of the Carpenters, wrote to C. A. Smith Contracting Limited as follows:

"May 3, 1979

C. A. Smith Contracting  
12 Herritage Rd.  
Markham, Ontario.

Re- Georgian Collage Orillia

Dear Sirs,

This letter is to confirm the fact that Al Smith Drywall and Partitions is not under contractual relationship with this local union or district council. If C. A. Smith Contracting were to use this contractor as a subcontractor for the drywall and accoustics you would be in violation of Art. 4 of the current collective agreement and subject to grievance.

Yours truly

(Sgd.) Torrance Ferrier

Torrance Ferrier  
Business Representative"

This letter was brought to the personal attention of Mr. Al Smith. Mr. Al Smith stated that after receipt of the letter, he telephoned CLAC and indicated that a problem had arisen. He was not sure of the date upon which he was in touch with CLAC. It is apparent, however, that the conversation with CLAC occurred between May 3, 1979, and May 16, 1979, because on the latter date, Ed Vanderkloet, Executive Secretary for CLAC, wrote to the architect concerned suggesting that the latter try to arrange to have a direct contract for the work with Al Smith rather than having it done through C. A. Smith. It was suggested that in this way the union requirements in the Carpenters collective agreement could be avoided. It is to be observed that up to this point all parties appear to have been dealing with the matter on the understanding that Al Smith was the only subcontractor involved. Barrie had not entered the picture at this time.

22. Al Smith became involved with the Brotherhood of Carpenters on another front when that firm made a successful bid for subcontract work on a General Tire Company project in Barrie on which the general contractor was Emery Contracting. The objection was raised that Emery Contracting had a collective agreement with the Carpenters containing subcontracting provisions requiring the use of carpenters. This situation arose before the signing of the subcontract between Barrie and C. A. Smith Contracting.

23. The Emery situation resulted in a meeting between Al Smith, Emery, and the Brotherhood of Carpenters at which the union impasse was discussed. The Carpenters were represented by Mr. Ferrier. Ferrier made it clear to Smith that Al Smith would not be able to get any jobs where the Brotherhood of Carpenters were the bargaining agents. In his testimony Smith said that Ferrier told him his intent was to put Al Smith out of business. Ferrier's version was that Smith stated at the meeting that if he had to take the Carpenters agreement, it would put him out of business. Ferrier's reply to this was: "If that's the way you see it, then

that's the way it is". He said that Smith had repeatedly protested during the meeting that if he signed an agreement with the Carpenters, he would be out of business. We accept Ferrier's version of what was said and view it as a straightforward statement of the factual situation as the Carpenters saw it in view of the provisions governing subcontracting contained in the collective agreement between Emery and the Brotherhood of Carpenters.

24. The Emery meeting did not resolve the matter involving that company and the problem with C. A. Smith and the Carpenters union also remained unresolved.

25. A meeting was arranged at the Toronto Construction Association (T.C.A.) offices between representatives of T.C.A., Al Smith, the Brotherhood of Carpenters and C. A. Smith Contracting. This took place in the early days of July and was for the purpose of attempting to resolve the impasse.

26. At the meeting at T.C.A. Smith revealed the existence of Barrie. It was agreed that Barrie would be used as the subcontractor instead of Al Smith and that a collective agreement would be made between the Carpenters union and Barrie. Mr. Smith represented both Al Smith and Barrie. His explanation for agreeing to sign the collective agreement on behalf of Barrie was that he had had a gun placed to his head and that it was necessary to sign the collective agreement if he was to be able to do the jobs on which Al Smith had been the successful bidder. Agreement was reached on the adjustment of wage rates and a document to that effect was signed on July 5, 1979 by Smith on behalf of Barrie, and Ferrier for the Carpenters. The agreement stated:

It is hereby agreed that on the signing of the current collective agreement between the Carpenters District Council of Toronto and Vicinity and the Employers Bargaining [sic] Agency on behalf of Barrie Plastering Drywall and Acoustics Co. Limited that the Union will waive the current rate of wages for the two named projects only Georgian College in Orillia and General Tire Barrie Ontario. The rate of wages for these projects only shall be \$9.00 per hour for a journeyman carpenter and \$9.25 for a working foreman.

This was a concession by the Carpenters since the successful bids had been based on rates below those in the Carpenters' collective agreement.

27. On July 20th Ferrier presented Barrie with two further documents. One of these is an agreement between Barrie and The Carpenters District Council of Toronto and Vicinity on behalf of a number of Locals of the United Brotherhood of Carpenters and Joiners of America. The agreement states that the employer, Barrie, acknowledges that on the 20th day of July, 1979, Gary Greaves and Paul Eenhoorn were employees of Barrie. The agreement is dated July 20, 1979, and is signed by Mr. Al Smith for Barrie and Torrance J. Ferrier for the union.

28. The second document is also dated the 20th day of July, 1979, and is an agreement between United Brotherhood of Carpenters and Joiners of America, Carpenters District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America and The Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of



America (the latter two being an employee bargaining agency designated under *The Ontario Labour Relation Act* by the Minister of labour) and Barrie.

29. The document recites that the union has demonstrated to the Employer that it has as members a majority of the employees of the employer engaged in work coming within the scope of the provincial agreement and that the parties have agreed that the union is entitled to represent such employees. The parties then agree that the document constitutes a voluntary recognition agreement and that pursuant to section 132(4) of *The Labour Relations Act* of Ontario, the Employer shall be bound by a provincial agreement.

30. At the hearing the intervener filed application for membership cards signed Gary Greaves and Paul Eenhoorn. Each of these membership cards bears the date of July 6, 1979.

31. These cards were signed after Ferrier had explained to the two employees that only persons who were members of the Brotherhood of Carpenters would be allowed on the Georgian College job and after he had indicated that an initiation fee of \$150.00 was paid. There was no evidence heard from the two employees concerned but Mr. Smith testified that the sum was \$250.00. On that understanding he agreed with the two employees but quite unknown to Ferrier or the Carpenters, to pay the employees an extra 75¢ per hour to help defray the expense of the initiation fee.

32. It was Ferrier's evidence that the two cards were signed on July 6th while the men were working in the Al Smith shop in Barrie. They were, however, gathering supplies to take to the job at Orillia and signed the cards while in or beside the truck in the presence of Smith. It had been Smith's request to Ferrier that these men be permitted to work on the job. It must have been clear to everyone that this involved joining the Carpenters or not getting on the site. Ferrier had made that abundantly clear.

33. It was argued over the objections of counsel for the intervener although no charges were filed that the Carpenters, through Ferrier, had used coercion and intimidation in its dealings with the two employees who signed cards. In our view, Ferrier's conduct does not fall into that category of cases where the Board has said that threat of the loss of a job unless an employee signs a membership card is coercive or intimidatory. In the circumstances present here, there was the existing collective agreement between C. A. Smith the general contractor, and the Carpenters alluded to earlier, requiring Carpenters membership by employees of the subcontractor. That agreement was reflected, as we have seen, in the commercial contract originally offered to Al Smith and subsequently signed with Barrie which contained the union's affiliation clause with which C. A. Smith required Al Smith to comply. Ferrier and C. A. Smith were, in their insistence, simply relying upon those pre-existing requirements of the agreement and explaining the compulsion arising out of that agreement for the employment of Carpenters members. The restrictive clause is common in construction industry contracts and was in no way produced for this particular situation.

34. The same type of consideration applies to the conduct of the employer whom the applicant, in its argument, suggested had improperly supported the intervener. Again, the pre-existing conditions were there and were none of the respondent's making. He responded to the factual, and legal, realities of the situation. Certainly he resisted the intrusion of the Carpenters for as long as he could without losing the job for himself and the employees involved.

35. We now turn to a consideration of the position of the applicant throughout the activities described above. the local representation of CLAC in the area is John Adema. He organized the employees of Al Smith in 1973 in Board Area 18 and obtained the subsequent certificates referred to earlier in this decision. He has negotiated and signed collective agreements with Al Smith throughout the intervening years.

36. It was Adema's testimony that CLAC became aware in May 1979 that Al Smith had been successful in its bid with respect to the Georgian College project. He was aware of the difficulty that developed between Al Smith and the general contractor with respect to the carpenters and this resulted in the letter of May 16th to the architect in charge of the project already referred to in this decision.

37. It was Adema's testimony that he was not aware of the existence of Barrie until late in August of 1979. He testified that all cheques covering checkoff of CLAC union dues were always issued by A. L. Smith and that he was unaware of any of CLAC's members having performed work for Barrie at any time in the past. Mr. Smith testified that he had not told anyone in CLAC about Barrie until after the completion of the deal with the Carpenters. The evidence indicates that Barrie had not been as active by any means as Al Smith and that the "Al Smith" labelled truck had always been used on Barrie jobs. Also, as indicated earlier, the CLAC contractual rates had always been paid on Barrie jobs. We are satisfied that Adema and CLAC were in fact not aware of Barrie until advised by Mr. Smith of its existence and use in the Georgian College project.

38. A question was raised with respect to the lapse in time which CLAC allowed between the date on which it became aware of Barrie and the date upon which it commenced this application. The evidence is that Adema told Mr. Smith as soon as he became aware of the situation that CLAC would consider its remedies under the Act. He was requested by Smith to have patience since he had arranged for a meeting with the Minister of Labour to take place in mid-September concerning the matter. Mr. Smith invited Adema to attend that meeting. It was Adema's testimony that the Minister had suggested at the meeting that further meetings be conducted concerning the matter.

39. It was obviously with the expectation of obtaining riddance of the Carpenters that Mr. Smith arranged the meeting. That he was disappointed in not obtaining the result he had hoped for is patent from his statement that the meeting did not solve anything and was a waste of time, intelligence and money. Nothing further developed from the meeting with the Minister and after waiting in vain for further steps to develop, CLAC launched these proceedings.

40. In our view CLAC's promptness or lack thereof in commencing section 1(4) proceedings in the circumstances of this case does not take on the importance usually attached by the Board to such a factor in section 1(4) situations, the reason for that being that the voluntary recognition of the Carpenters was a *fait accompli* before CLAC became aware of the existence of Barrie. It is thus not a question of leaving bargaining rights exposed. The real question here is whether, assuming for the moment that the voluntary recognition and resultant collective agreement are proper, the Board ought to grant the applicant's request for revocation of bargaining rights, if any, purported to be held by the Carpenters.

41. It was the intervener's position that the Board lacks the jurisdiction under section

1(4) of the Act to revoke a collective agreement or bargaining rights properly acquired under the Act. Leaving the question of jurisdiction to revoke aside for the moment, the Board has expressed the view that it is desirable that section 1(4) be applied when the situation is fresh and not after bargaining rights have been acquired by another union (see *D. L. Stephens Contracting Niagara Limited*, [1978] OLRB Rep. June 531). In *Industrial-Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029, the Board stated at page 1033, paragraph 18:

Further, we do not think that section 1(4) was intended to be used by one trade union as a bar to another trade union obtaining bargaining rights in a company where the first trade union held no existing bargaining rights whatsoever.

42. In the present case we find that the insistence by the Carpenters' union on its rights under its agreement with the general contractor and the similar insistence by the general contractor that the sub-contract be carried out by a company whose employees were in the Carpenters together with Ferrier's explanations to the employees concerned that only members of the Carpenters could work on the job, were all based upon pre-existing legal obligations and do not involved improper conduct under the Act. The voluntary recognition agreement and the subsequent collective agreements are accordingly valid.

43. It is perhaps unfortunate from CLAC's point of view that its knowledge of the existence of Barrie came only after the creation of the Carpenters' bargaining rights but that is not a circumstance which enables the Board, if it were so inclined, to grant CLAC the relief it seeks. This would have been the case even if CLAC had brought its application immediately upon learning about Barrie since, as already indicated, the Carpenters had already acquired bargaining rights.

44. The Board, in the present instance, adopts the views set out in the cases cited above and declines to revoke the bargaining rights of the Brotherhood of Carpenters. The Board accordingly declares that the intervener is the bargaining agent for the employees of Barrie described in the recognition agreement and the subsequent collective agreements. CLAC, of course, retains its bargaining rights for the employees of Al Smith.

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**1762-80-U Myrna Wood, Complainant, v. Canadian Red Cross Blood Transfusion Service Employees Association, Respondent, v. Canadian Red Cross Blood Transfusion Service, Hamilton, Centre, Intervener.**

**Bargaining Unit – Duty of Fair Representation – Board certificate excluding “temporary employees” from bargaining unit – Recognition clause making most contract provisions excluding grievance procedure applicable to temporary employees – Union refusing to grieve temporary employee’s discharge – Whether temporary employees in unit – Whether union violating section 60**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J.D. Bell and C. A. Ballentine.

**APPEARANCES:** *Myrna Wood and Peter Slee for the complainant; B.P. Bellmore, Doug Simpson and Joanne Hatfield for the respondent; Howard Levitt, Hector Martinez, Barb Bogoch and Donald Bethune for the intervener.*

**DECISION OF THE BOARD;** February 18, 1981

1. This is a complaint under section 79 of *The Labour Relations Act* alleging that the respondent trade union has failed to represent “temporary” employees of the intervener, Canadian Red Cross Blood Transfusion Service, and in particular the complainant, Myrna Wood, in a manner that is not arbitrary, discriminatory or in bad faith, within the meaning of section 60 of the Act. Section 60 provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The complainant indicates general dissatisfaction with the level of representation which the respondent has been prepared to afford “temporary” employees of the intervener, but more specifically complains of the respondent’s refusal to grieve the complainant’s termination of employment. The respondent in fact has declined to consider Ms. Wood’s grievance at all, on the ground that, as a “temporary” employee, she is not an employee within the bargaining unit covered by the respondent’s collective agreement. For the same reason, the respondent takes the position that the Board is without jurisdiction to proceed further with this complaint.

3. The Board has in prior decisions pointed out that, having regard to the express terms of section 60 of the Act, the section only extends its protection to employees who are “in a bargaining unit” that the trade union is “entitled” to represent. See *James Mason*, [1979] OLRB Rep. Feb. 116 and the cases cited therein, at paragraph 3. The words “entitled to represent employees in a bargaining unit” make it clear that, as one might anticipate, the duty of fair representation in section 60 only arises where an employee’s individual avenues of redress have been abridged; that is, where the trade union has under the terms of *The Labour Relations Act*, become the exclusive bargaining agent for the employee. Under the present

Act, this can occur in one of two ways: either through certification by the Board, or through what is commonly referred to as “voluntary recognition”.

4. In the present case the respondent was certified in 1976 for an agreed-upon bargaining unit described as follows:

All non-professional employees of The Canadian Red Cross Society (Blood Transfusion Service) (CRCBTS) working at or out of the Toronto Blood Transfusion Centre, the Hamilton Blood Transfusion Centre, the Ottawa Blood Transfusion Centre and the London Blood Transfusion Centre, employed as Clinic Assistants, Clerical Staff, Transport Staff and Laboratory Helpers, save and except Transport Officers, the Office Manager (Toronto), Office Supervisor (Ottawa), Centre Secretary-Stores Accountant (Hamilton) and Office Supervisor (London), persons employed above these ranks, and those employed on a casual, part-time or temporary basis.

As can be seen, while the Board is normally opposed to such designations, in the particular circumstances of that case the Board accepted the agreement of the parties to exclude “temporary” employees. This bargaining-unit description, contained in the Board’s certificate, was carried by the parties into their first collective agreement, and into each succeeding collective agreement.

5. In the negotiations for the renewal of the collective agreement which took place in 1978, the respondent trade union expressed its concern that the exclusion of “temporary” employees could be used by the employer, for reasons of economy, to undermine the integrity of the bargaining unit. The respondent therefore tabled a demand that “temporary” employees be included in the bargaining unit. The employer took the position that it was neither required nor prepared to agree to any extension of the bargaining unit beyond that originally certified by the Board. To demonstrate, however, that it was not motivated by the possibility of gaining an economic advantage through the use of temporary employees, the employer offered as a compromise to commit itself to the application of various terms of the collective agreement to temporary employees. The respondent’s president, Joanne Hatfield, confirmed in her testimony that the respondent was unsuccessful in its efforts to have the collective agreement apply to the temporary employees, and contended itself to do the best it could. An Article 2.02 was added to the collective agreement to spell out the articles which the employer was undertaking to apply to temporary employees. The list of articles includes virtually all of those items in the collective agreement going to compensation, as well as miscellaneous others, but contains no reference to Article 3 of the agreement, which introduces the requirement of “just cause” for discharge. Even more notable for its absence, however, is any reference to the grievance and arbitration provisions of the agreement. “Seniority” also is omitted, but a provision was agreed upon whereby temporary employees would be given preferential consideration for permanent vacancies over persons applying off the street. The employer was, in addition, authorized to deduct and remit union dues on behalf of any temporary employees voluntarily requesting the employer to do so. Permanent employees, on the other hand, are *required* by the collective agreement to authorize the deduction of dues. As a result of the accommodations thus reached in these negotiations, Article 2 of the collective agreement appeared, and continues to appear, in the following form:

## RECOGNITION

2.01 The Society recognizes the Association as the exclusive bargaining agent of all non-professional employees (support staff) of the Society working at or out of the Toronto Blood Transfusion Centre, the Hamilton Blood Transfusion Centre, the Ottawa Blood Transfusion Centre and the London Blood Transfusion Centre, employed as Clinic Assistants, Clerical Staff, Transport Staff, Laboratory Helpers and Utility Persons, save and except Transport Supervisors, Assistant Transport Supervisors, Centre Secretaries, persons employed above these ranks, and those employed on a casual, part-time or temporary basis.

- (a) The parties agree that upon the completion of three (3) continuous months of employment the provisions of the Agreement as specified under the Articles hereunder indicated shall apply to all persons employed on temporary full-time basis in positions included within the bargaining unit, either as authorized leave replacements, seasonal help, or for specific projects where the employee's duration of employment shall terminate upon completion or discontinuance of the project:

Article 13	Wages
14	Hours of Work and Overtime
15	Vacations with Pay
16	Statutory Holidays
20	Leave of Absence Without Pay
21	Special Leave
22	Marriage Leave
23	Compassionate Leave
24	Court Duty
25	Handicapped Employees
26	Welfare (except the benefit plans included in par. 26.02)
27	Uniforms
28	Sick Leave
29	Transportation
30	Meal Allowance
31	Lodging
33	Safety and Health and Employment Conditions
36	Position Premiums
37	Employee Performance Review and Employee Files

and, further, such employees shall be entitled to preferential consideration in filling up permanent full-time vacancies within the bargaining unit to which they are qualified, as against outside applicants. All full-time temporary employees shall upon commencement of their employment be provided with a letter setting forth the duration of their employment.



- (b) If the Association provides the Society with an authorization<sup>1</sup> signed by such temporary full-time employees for the deduction of Association dues from their pay, the Society shall make such deduction and remit same to the Association.

6. The complainant, who was, of course, not a party to the above-described negotiations, argues that the legal effect of what the parties agreed to was to confer upon the respondent trade union "voluntary recognition" with respect to temporary employees, and that the complainant is therefore now an employee "in the unit".

7. "Voluntary recognition" acquires its legal status primarily from sections 15(3) and 5(3) of *The Labour Relations Act*. Section 15(3) in particular reads:

Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

As can be seen, consistent with the colloquial reference to "voluntary" recognition, the section contemplates that bargaining rights under the Act may be conferred by agreement of the parties, which must be in writing. Such language clearly makes *intent* an essential ingredient to the conferring of bargaining rights within the meaning of the section. The Board recognizes, however, that this intent need not be explicitly stated; it may, rather, be inferred from the entire document before the Board, and, where an ambiguity exists, from the conduct of the parties as well. See *Massicotte and Teamsters Union Local 938*, (1980) 1 Can. LRB Rep. 427 (CLRb); application for review dismissed December 15, 1980 (F.C.A.).

8. The complainant here relies upon the fact that the respondent in the 1978 negotiations admittedly set out to bargain on behalf of the temporary employees, and did so. Such "bargaining" however need not be synonymous with the exclusive bargaining authority which can be conferred under the Act, and which is critical to the application of section 60. As a general matter, any individual or group can, if it chooses, attempt to bargain on behalf of another, in an effort to confer some benefit on the other. By doing so, parties do not necessarily bring the provisions of *The Labour Relations Act* into play. This proposition would be more clearly self-evident if the commitments made by the employer in this case were obtained through the efforts not of the respondent, but by some other individual or a group that was not a "trade union" within the meaning of the Act. The fact that the "agent" in this case was a certified trade union already representing employees of that employer does, of course, create a more ambiguous situation requiring careful scrutiny. The Board must be cautious, however, in casting upon good-faith arrangements arrived at between parties legal consequences which neither party may have intended to arise, lest the Board discourage such accommodations from taking place at all.

9. Unlike the *Massicotte* case, *supra*, the present case does not contain an unqualified "all employee" recognition clause; nor did the trade union here purport to bind the employees in question to a *reduction* in their level of compensation, nor to a *mandatory* check-off of union dues in return for services rendered. The recognition clause in this case, Article 2.01,

contains an express exclusion for “temporary employees”. While the ensuing language of Article 2.02 does, certainly, raise at least an element of ambiguity, the extrinsic evidence received by the Board in this case is highly instructive. The very issue which the respondent trade union raised in the 1978 negotiations was that temporary employees be added to the bargaining unit. The employer refused to extend the bargaining unit, and the respondent accepted that. Instead, both parties agreed to a compromise, whereby the employer, to protect the integrity of the bargaining unit, agreed to a common application of various terms of the collective agreement. Once engaged in an enumeration of the terms which would apply on a uniform basis, it is obvious that the employer agreed to include in the list a number of relatively inconsequential terms going beyond mere compensation. The omission of the grievance and arbitration procedure from that list, however, reinforces the conclusion that the parties clearly understood that they were not by their actions bringing the temporary employees within the actual coverage of the collective agreement. The Board finds this conclusion to be more consistent with the evidence of the parties and the language used than the alternative conclusion relied upon by the complainant, that is, that the bargaining unit covered by the collective agreement was itself extended to cover temporary employees, so that by the operation of section 37 of *The Labour Relations Act*, a grievance and arbitration procedure for temporary employees must be implied. Clearly the additional provision for preferential treatment on hiring goes beyond the mere protection, from the respondent’s point of view, of the integrity of its existing bargaining unit. In the circumstances of this case, however, the Board does not find it surprising or persuasive that the respondent, having failed to have temporary employees included in the bargaining unit, would be desirous of at least obtaining a commitment that temporary employees be given first chance at vacancies as they arose within the unit. The temporary employees do, after all, work side by side both with the members of the bargaining unit and the officers of the respondent Association.

10. The complaint in the present case therefore comes down to this: the Board is asked to hold that, having accepted in good faith the employer’s compromise in 1978, which did not include a right for temporary employees to grieve under the collective agreement, the respondent should have gone back to the employer in 1980 and attempted to grieve the complainant’s termination. The Board finds nothing in the evidence before it, or on grounds of labour relations policy, which would compel it to that conclusion. The Board is not without sympathy in regard to any confusion which the instant situation may have created in the mind of the complainant as to her status. In the final analysis, however, the Board must find that the complainant has simply had the benefit of whatever improvements to her contract of employment the respondent was able to obtain for her. That contract, with those additional benefits, has at all times remained enforceable for the complainant in the same way (i.e., in the Courts) that it was before the respondent intervened.

11. Because the complainant was not, however, an employee “in a bargaining unit” at the time of the respondent’s refusal to grieve on her behalf, this complaint must be dismissed.

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**1535-80-U C.U.P.E. Local 543, Complainant, v. Corporation of the City of Windsor, Respondent.**

**Natural justice – Practice and Procedure – Section 79 – Employer objecting to presence of legal counsel at grievance meeting – Whether denial of natural justice – Whether right to counsel implicit in section 37 – Whether refusal to permit counsel contrary to Act – Whether employer interfering in administration of union**

**BEFORE:** George W. Adams, Chairman, and Board Members C. G. Bourne and O. Hodges.

**DECISION OF THE BOARD;** February 17, 1981

1. This complaint filed under section 79 of the Act alleges that the respondent has dealt with the complainant and Kathy Langlois contrary to section 37 of *The Labour Relations Act* and requests that “the Board order the respondent to cease its practice of denying the union the right to have legal counsel present during grievance proceedings involving disciplinary matters particularly when the charge against the employee is serious in nature and when the grievance involves complex legal and factual issues.”

2. The particulars filed with the complaint state:

“On or about September 16th and 19th, 1980, the grievor was dealt with by the City Administrator Mr. Hilary Payne of the respondent contrary to the provisions of section 37 of *The Labour Relations Act* in that he did on his own behalf or on behalf of the respondent refuse to allow C.U.P.E. Local 543 and Kathy Langlois the right to have legal counsel present during a grievance hearing before the City Administrator.”

The complaint notes that the decision of the City Administrator to refuse legal counsel to be present is being taken to arbitration and further states:

“Although *The Labour Relations Act* does not expressly provide for a right of counsel it is respectfully submitted that the Act incorporates the rules of natural justice whenever they are otherwise applicable. In some situations particularly where there is a disciplinary grievance involving complex legal and factual issues the union must be entitled to have legal counsel present if it is to be able to effectively exercise its right to have matters resolved by grievance procedures and arbitration as guaranteed in section 37 of *The Labour Relations Act*.”

3. After delivery of the complaint to the respondent, counsel for the respondent moved before the Board to dismiss the complaint under Rule 46 of the Board’s Rules of Procedure upon the following grounds:

“The Application, on its face, concedes that the proceedings in which the right to Counsel was allegedly denied occurred during the course of grievance proceedings established under a Collective Agreement (to which the Complainant and Respondent are parties).



The right to Arbitration of the grievance is assured to the Complainant if the complaint is not resolved to the satisfaction of the Complainant.

A copy of the Collective Agreement has been filed by the Respondent with the Minister pursuant to Section 74 of the Act and is available to the Board for study and consideration.

Consideration of any matter during the course of grievance proceedings (and before Arbitration) are not “proceedings” within the meaning of the Statutory Powers Procedure Act and the City Administrator, Mr. Hilary Payne, is not a “tribunal” as defined by that same legislation.

The Application, on its face, concedes that the *Ontario Labour Relations Act* does not make any express provision for a right to Counsel.

The Common Law does not confer a right to Counsel even in proceedings before an Arbitrator.

See list of cases annexed.

Reference to a violation of Section 37 of the Act is misconstrued in that the proceedings referred to in the Application were not proceedings before an Arbitrator but, rather, proceedings during the course of the “in house” grievance procedure before the matter was submitted to Arbitration.”

4. In its reply, counsel for the union opens his submission by stating:

“With respect, the right to counsel issue, I readily concede that there is no obvious breach of the *Ontario Labour Relations Act*.”

Counsel goes on to argue that section 37 of the Act contemplates that a grievance procedure will exist in a collective agreement, and further that because complex legal rights may arise or may be affected during the grievance procedure, implicit in section 37 is the right of a trade union to have counsel present during the grievance meetings with the employer. Counsel further submits that the decision to exclude counsel was made arbitrarily, that the City Administrator did not exercise his discretion properly, and that there is an apprehension of bias because the City Administrator who conducted the grievance hearing was also involved in the management decision to discharge the grievor. In essence, counsel argues that there has been a denial of natural justice and that the City Administrator has therefore violated *The Labour Relations Act* by denying the grievor and the union the right to have a lawyer present during the hearing under the grievance procedure.

5. The complainant relies upon section 37 of *The Labour Relations Act* as the statutory basis for his submission that there is a right to have counsel present during the grievance procedure. However, section 37 of the Act does not require a grievance procedure to be contained in every collective agreement and, in any event, a grievance procedure is essentially a private process intended to resolve amicably differences between the parties prior to arbitration. The grievance procedure is not a quasi-judicial proceeding. Therefore, there

cannot be a denial of natural justice, nor can there be any basis for alleging a violation of the Act because there is an apprehension of bias on the part of the employer representative who is dealing with the grievance. Simply put, the trappings of judicial process are not applicable to grievance procedures in the private sector. Therefore, it cannot be said that a party has a “right” to call witnesses; a “right” to cross-examination; and a “right” to counsel in connection with a grievance procedure meeting. To the extent that the complaint is brought on this basis, it is ill-founded and is therefore, pursuant to Rule 46(1) of the Board’s Rules of Procedure, dismissed.

6. However, sections 3 and 56, *inter alia*, of *The Labour Relations Act* envisage that the extent of trade union representation is an internal trade union matter. The employer’s interest in such matters is explicitly limited. For example, in applying these sections this Board has said that an employer can have no objection to the composition of a trade union’s bargaining committee. See, for example, *Regina ex rel Daley v. No-Sag Spring Company Ltd.* 68 CLLC ¶14,088; *House of Braemore Upholstered Furniture* 67 CLLC ¶16,028; *Marshall-Wells Co. Ltd.* 55 CLLC ¶18,002; *Superior Box Co. Ltd.* 61 CLLC ¶16,189. It is debatable that the same reasoning applies to the composition of any group the trade union may wish to involve in the grievance procedure under a collective agreement. We may therefore be willing to entertain this complaint on this basis and on this basis alone. But even if a complaint proves successful on this basis, the inherent characteristics of a grievance meeting remain unchanged. Such meetings are an opportunity for dialogue and may be as perfunctory or as meaningful as the parties who participate in them wish.

7. Rule 46(2) permits the complainant to apply to the Board for a review of its decision issued under Rule 46(1). Should the complainant wish to proceed on the basis outlined in paragraph 6, it may apply to the Board for a review of this decision in accordance with the Rules.

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**2040-80-U United Steelworkers of America, Complainant, v. Fotomat Canada Limited, Respondent.**

**Duty to Bargain in Good Faith – Section 79 – Union accepting employer proposals – Employer insisting on ratification vote as condition of signing – Whether interference in internal union affairs – Whether bad faith bargaining intended to undermine union's exclusive authority – Whether existence of impasse pre-condition for votes under sections 34d and 34e**

**BEFORE:** George W. Adams, Chairman and Board Members F. W. Murray and W. F. Rutherford

**APPEARANCES:** *James Hayes and William Mills for the complainant; and John P. Sanderson, Q.C., Heather J. Laing and Steven J. McCormack for the respondent.*

**DECISION OF THE BOARD; February 13, 1981**

1. This is a complaint filed under section 79 of *The Labour Relations Act* alleging violations of sections 14, 66, 58 and 61.

2. The complainant pleads and relies upon all essential facts and legal conclusions contained in the Board's decisions dated October 24, 1980 and November 20, 1980. In the former decision the Board found, inter alia, that the respondent had failed to bargain in good faith and make all reasonable efforts to enter into a collective agreement. The respondent was directed, in part, to resubmit to the complainant an offer of settlement first made to the trade union on February 25, 1980 which the Board found to have been unlawfully withdrawn in the month of June 1980. The respondent was also directed to reinstate all striking employees who wished to make unconditional applications for employment by December 1, 1980.

3. Essentially, this complaint arises in the context of these two directions and their implementation. One aspect relates to the propriety of the subsequent collective bargaining between the parties. The other component of the complaint pertains to allegations of mistreatment of returning employees who had been on strike but returned to work under the Board's October 24, 1980 order. The parties agreed to deal with the collective bargaining aspect of the complaint first and seek a decision from the Board with respect to those discrete allegations. The Board accommodated that agreement.

4. On November 25, 1980 the complainant and respondent met and the respondent retabled its offer of February 25, 1980 reproduced in the Board's earlier decision of October 25, 1980. The complainant responded by taking the position that the recognition clause pertained to all sixteen bargaining units other than Warden Avenue; by making proposals for Articles 3.01, 6 and 7.07; and by proposing numerous conditions of employment for the Warden Avenue location. The respondent requested time to consider this response and another meeting was arranged for December 3, 1980. By letter dated November 28, 1980, the complainant varied its November 25, 1980 position by accepting the respondent's language for Articles 3.01 and 7.07 and requested the minimum statutory union security provision for Article 6. By telegram of the same date, the respondent expressed the view that the complainant had, in effect, rejected its offer of November 25, 1980 but indicated its intention to meet on December 3, 1980.



5. On December 3, 1980, the respondent, through its spokesman Mr. Frederick R. Von Veh, tabled a new offer styled as a "*complete and inclusive package proposal to the Union*". The offer consisted of four parts. The first part dealt with the Municipality of Metropolitan Toronto area; the second with some fourteen locations outside Metropolitan Toronto; the third part pertained to Warden Avenue (Maintenance and Route Drivers); and the fourth part, which is the subject matter of this aspect of the complaint, proposed a procedure by which all employees would be permitted the opportunity to "signify acceptance or rejection of the within respective offers." Part IV, in its entirety, provided:

IV In view of the lengthy negotiations between the parties and the lengthy strike which has taken place, the Company requests that the United Steelworkers of America and the Company make a joint request to the Minister of Labour, pursuant to Section 34(d) of *The Labour Relations Act* directing that a vote of employees of each of the bargaining units specified in I, II, and III above (that is, 16 bargaining units) be held at a time agreed to between the parties wherein respective employees can signify acceptance or rejection of the within respective offers. The voters' lists for each of the bargaining units are to be agreed to between the parties and in so doing the parties shall have regard to Section 63(4a) of *The Labour Relations Act*, as amended, and the accepted principles of jurisprudence governing who is entitled to vote in such circumstances. The vote herein specified is to be conducted and supervised by the Ministry of Labour.

6. The complainant trade union, through its representative Mr. William Mills, purported to accept the respondent's offer in all respects except for Part IV. With respect to that part, the complainant took the position that it had the legal authority to negotiate and accept a collective bargaining agreement on behalf of all the employees to whom the respondent's offer would apply. Mr. Mills, on cross-examination, admitted that the complainant's usual practice was to hold a ratification vote of affected employees but he stressed that this was a most unusual situation. There had been a long strike; the respondent had replaced strikers with individuals who were likely to "vote the contract down", lacking any loyalty to the complainant; and over fifty employees of the original one hundred and thirty in the bargaining units had remained on strike for a very substantial period only returning to work under the Board's October 24th order. Mr. Mills also testified that he consulted with his negotiating committee of employees who concurred in the approach which Mills subsequently adopted. He also consulted with his immediate superiors and with legal counsel. Mills testified that the reference to ratification under the heading "Term" in Part III of the respondent's document was complied with, in his view, when he accepted on behalf of the complainant trade union. There is no dispute that the complainant's constitution does not require ratification by either its members or affected employees and that Mills had the status of a duly authorized representation of the complainant at the time he purported to accept the respondent's offer.

7. Mr. Frederick Von Veh testified on behalf of the respondent and attempted to explain Part IV of the respondent's proposal. He testified that the strike had been long and that there had been a substantial turnover of employees. He testified that the respondent had received telephone calls from employees indicating that they were not being kept apprised of "what was going on." Accordingly, in order for the respondent to be "satisfied that the

employees [knew] what had been negotiated” and so that they could “intelligently see what had been done”, a form of ratification vote to enable the employees to express their wishes was proposed. He testified that a joint application to the Minister of Labour was required “to enhance the possibility of having the application [pursuant to section 34d] granted” and to add “an aura of propriety to what was being requested.” When Mills advised the respondent’s representatives that ratification was not necessary and that he was prepared to sign a collective agreement, Mr. Von Veh observed that “[Mills] did not have to live with our employees” and continued to insist on Part IV.

8. By letter dated December 9, 1980, Mr. Mills reaffirmed the complainant’s position in writing (in part):

This letter is to advise you that the Union is of the view that agreement has been reached for all certified bargaining units and that the Company is obligated to sign a document incorporating that agreement. Our office is in the process of preparing contracts for signature and we hope to deliver them to you in the next few days.

The respondent replied by letter dated December 11, 1980 and at page 3, over the signature of Mr. Von Veh, wrote:

Bearing in mind the aforementioned, we wish to again reiterate the position of our client as conveyed to you on December 3, 1980. Part IV of the Company’s proposal deals with ratification (and indeed this is reflected elsewhere in the Company’s proposal). Your union may wish to accept Parts I, II and III of the Company’s proposal, however, ratification is a necessary and required prerequisite to the proper execution of the Collective Agreements in question.

In view of the fact that an all inclusive proposal was tabled, and further in view of the fact that an essential ingredient of collective bargaining, namely, the ratification of what has been agreed to by the parties has not been addressed by your Union, we wish to advise that our client does not concur with what is contained in paragraph 4 of your letter to us dated December 9, 1980.

Three collective agreements purporting to set out the agreement of the parties, save for Part IV of the respondent’s proposed memorandum of settlement, were sent to Mr. Von Veh for signature and he replied that it was not his client’s intention to execute the collective agreements “at this time.”

9. On behalf of the complainant, Mr. Hayes made a number of submissions. First he submitted that Part IV was proposed by the respondent as a patent attempt to illicit a rejection of the offer by the complainant and therefore violated sections 14 and 58. He argued that this was particularly the case given the earlier relationship between the parties before the Board. It was his submission that clear and compelling evidence was needed to establish the bona fides of the respondent and to rebut the prima facie bad faith nature of the proposal. Secondly, he submitted that while the issue of ratification could be discussed by parties in collective bargaining, no party could take the issue of the other party’s method of contract ratification to

impasse. In this respect the Board was referred to *Carpenters Employer Bargaining Agency*, [1978] 2 Can. LRBR 501; *Toronto Star*, [1979] OLRB Rep. Aug. 811; and *Cybermedix Limited*, [1981] OLRB Rep. Jan. 13. A third but related submission was that neither section 34d nor section 34e contemplated a final offer vote where the parties were already in agreement, i.e. where the trade union was willing to accept the employer's last offer. It was submitted that section 34d (at the discretion of the Minister of Labour) and section 34e (at the discretion of the employer) each contemplate an impasse between the collective bargaining parties. Referring to the Board's decision in *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. Sept. 1337; partial dissent [1980] OLRB Rep. Oct. 1574, Mr. Hayes argued that, in an attempt to prevent or shorten industrial conflict, these two provisions provide a system for direct access to bargaining unit employees. He contended that the provisions were exceptional when viewed against the scheme of the Act and that they ought to be strictly construed. The fourth and last substantive submission of the complainant was that Part IV clearly violated sections 56 and 14 of *The Labour Relations Act* in that it interfered with the internal administration of the trade union. It was submitted that section 60 and the bargaining rights termination provisions of the statute provided a complete scheme of protection and relief for employees concerned about the responsiveness of a trade union. It was submitted that the respondent's professed interest in employee awareness of the negotiations constituted a bald attempt to circumvent or reach around the legally designated bargaining agent and to deal directly with bargaining unit employees contrary to sections 14 and 56. In support of this contention the Board was referred to *Darlington Veneer Company Inc.* (1955), 113 NLRB 1101, upheld (1956), 38 LRRM 2575 (CA-4); *Hochens Market* (1965), 155 NLRB 729, upheld (1967) 64 LRRM 2647 (CA-6); *M & M Oldsmobile Inc.* (1967), 65 LRRM 2149 (CA-7); *American Seating Co.* (1970), 73 LRRM 2996 (CA-5); *Pioneer Broadcasting Company* (1973), 82 LRRM 1809; *Schill Steel Products Inc.* (1973), 83 LRRM 2386 (CA-5); *Cheese Barn Inc.* (1976) 222 NLRB 418; upheld (1977), 95 LRRM 3096 (CA-9); and *Barry Co.* (1979), 101 LRRM 1017. With respect to the issue of remedy, the complainant requested: (i) a declaration that the Act had been violated; (ii) a direction that the respondent cease and desist in such violations; (iii) a direction that the respondent forthwith execute collective agreements incorporating all matters previously agreed to for all certified bargaining units; (iv) damages with interest as appropriate payable to all bargaining unit employees arising from the loss of opportunity to negotiate a collective agreement from October 24, 1980 until the date the respondent executes the collective agreements; (v) a direction that the respondent post a Board notice in the usual form and that the notice be mailed to each member of the bargaining unit; (vi) a direction that the respondent provide the complainant with reasonable access to all working locations to post union notices for the purpose of communicating with employees for the life of the collective agreement, and (vii) a direction that the respondent provide the complainant forthwith with a list of names, addresses and telephone numbers of all bargaining unit employees and to keep the list updated monthly for the life of the collective agreement. With respect to the requested direction that the respondent execute collective agreements, we were referred to the Board's decision in *Canada Cement Lafarge*, [1980] OLRB Rep. Nov. 1583 and the cases cited therein.

10. Mr. Sanderson submitted that the respondent was not seeking to control the complainant's internal ratification procedures, but instead was invoking a provision of *The Labour Relations Act*. He submitted that section 34d provided a discretion in the Minister of Labour and that the respondent was entitled to request him to exercise it. He contended that the respondent had complied with the Board's earlier order but that, without some form of ratification process, neither the complainant nor the respondent would ever know the true



wishes of the employees. Mr. Sanderson stressed the disruptive consequences of imposing a collective agreement regardless of the wishes of the employees. He pointed out that the complainant could have proposed alternative ratification procedures but declined to do so. He submitted that the respondent may have been acting in an overly prudent manner or to maximize its own self-interest, but there was no evidence to suggest bad faith. Mr. Sanderson submitted that the respondent's insistence on the application of section 34d was no different than if the complainant trade union had insisted on binding arbitration pursuant to section 34c of *The Labour Relations Act*. It was argued that the respondent employer was simply motivated by its concern for the reaction of its employees should a collective agreement be consummated without their involvement. On the issue of remedy, Mr. Sanderson contended that a direction to the respondent to execute collective agreements was strikingly at odds with section 63(4a) of *The Labour Relations Act* - a section aimed at full bargaining unit participation where ratification votes are held.

11. Having reviewed the evidence and the able submissions of counsel, we find the conduct of the respondent employer is in clear violation of sections 14, 56 and 58 of *The Labour Relations Act* and that the complainant, in the circumstances, is entitled to the relief requested.

12. A trade union certified by the Ontario Labour Relations Board is the exclusive bargaining agent for all the employees in the bargaining unit. The employer is obligated to deal with the certified bargaining agent and that bargaining agent alone. See *Darlington Veneer Company Inc.*, *supra*, and *J. I. Case Co. v. NLRB* (1944), 321 U.S. 332. The unique and important nature of a trade union's collective bargaining status as bargaining agent was recently reviewed by this Board in *Wilson Automotive (Belleville) Ltd.*, *supra*, where the majority wrote:

18. Under *The Labour Relations Act* an employer makes his contract with the union and not with the employees. It is common to refer to a union as a "bargaining agent". A union is however, much more than a mere agent when it comes to negotiating and administering a collective agreement. A union has an independent legal existence which the employer is bound to respect. This critical distinction was recognized by the Supreme Court of Canada in *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1. Here at p. 6, Laskin C.J.C. adopted the following language of Judson J. in *Syndicat Catholique des Employés des Magasins de Québec, Inc. v. Compagnie Paquet Ltée* (1959), 18 D.L.R. (2d) 346 at 355;

The union contracts not as agent or mandatory but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms.

19. By refusing to accept the union's execution of the collective agreement and insisting on a ratification vote among all of the employees the respondent has in fact refused to recognize the union as the body with the exclusive authority to make a collective agreement. By this failure to recognize the union the employer has violated the most fundamental

aspect of its duty to bargain in good faith set out in section 14 of the Act. (*DeVilbiss (Canada) Ltd.*, [1976] OLRB Rep. Mar. 49.)

13. Part IV of the respondent's proposal is a clear attempt to reach around the exclusive bargaining agent and deal directly with bargaining unit employees. This is its obvious effect. Such conduct violates sections 14, 56 and 58 of *The Labour Relations Act*. As the United States Supreme Court held in *NLRB v. Borg-Warner Corp.* (1958), 356 U.S. 342, 42 LRRM 2034 at 2037 (per Barton J.), this type of proposal "substantially modifies the collective bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its with its employees rather than with statutory representative."

14. The fact that the proposal was framed in terms of section 34d of *The Labour Relations Act* is of no assistance to the respondent. The clear wording of that provisions and its underlying purpose demonstrates that it has no application to the circumstances in which the respondent found itself. At the time the proposal was made a strike or lockout was not in progress (striking employees having returned to work) and, in any event, the respondent continued to insist on Part IV even after the exclusive bargaining representative had given its concurrence to all of the substantive collective bargaining provisions proposed by the respondent. Section 34d and its more recent counterpart section 34e are designed to test the wishes of employees where an impasse or conflict is being prolonged by the refusal of a bargaining agent to accept the last offer of an employer. A similar point was made at paragraph 11 in dealing with section 34e in the recent *Canada Cement Lafarge Ltd.* case, *supra*:

In our view, the section is designed to reduce industrial conflict in at least two ways. If a bargaining representative is not accurately reflecting the wishes of the represented employees, the impasse is not justified and a vote to accept the employer's last offer ends further unnecessary conflict. On the other hand, if the employer is reluctant to alter his position because he erroneously believes the bargaining agent to be out of touch with its constituency, a vote to reject the last offer will convey that real movement is required to overcome the bargaining impasse. Hopefully, employers will react to this latter purpose, instead of "digging in" for a longer strike.

In our view, the respondent is no more entitled to the benefit of section 34d, than was the respondent employer in *Wilson Automotive (Belleville) Ltd.*, *supra*, entitled to make an application under section 34e in the circumstances of that case. All of the reasoning in that case applies with equal force to the facts at hand. Moreover, it is well accepted that a statutory provision cannot be relied upon as a defense to bad faith or improper conduct contrary to sections 14, 56 and 58. See *Radio Shack*, [1979] OLRB Rep. Dec. 1220 at 1251, upheld at 80 CLLC ¶14,017, (Ont. Div. Ct.).

Having regard to all of the surrounding conduct of the respondent and particularly the findings of fact and legal conclusions in the two earlier decisions of the Board, We are satisfied that Part IV of the respondent's offer of December 3, 1980 was improperly calculated to cause the the complainant trade union to reject the offer or to provide an opportunity for bargaining unit employees to reject the said offer. See paragraph 18, *infra*.

15. If the respondent was entitled to rely on this tactic, it would be able to profit from all of the delay caused by its earlier unlawful conduct in refusing to recognize the complainant trade union as the certified bargaining agent of Fotomat employees. At this point in time and having regard to all of the surrounding circumstances, we find it difficult to accept the respondent's claimed concern for a greater involvement of its employees in the collective bargaining process. From this perspective, the following observations of the U.S. Court of Appeals, Fifth Circuit (New Orleans) in *NLRB v. Schill Steel Products Inc.*, *supra*, at 2389-90 are entirely apposite:

We note that here, as is often the case in labor cases, the employer argues valiantly for the right of the "rank and file" to be protected against the imposition of a union they did not want. Counsel for the company eloquently argues that purposes of the Act are frustrated when a union is imposed on employees against their will. What this pious statement overlooks is that there once was indeed a fair representation election in this bargaining unit and that the union was selected by a majority of the employees. It further overlooks the numerous unfair labor practices which the employer engaged in to bring illegal pressure on employees to reject the union. It overlooks the unlawful refusal of the employer to bargain with the employees chosen by the very method of selection that it now claims would have been frustrated had it not risen up on January 17, 1966, to challenge the union's representative status. While such representations are not at all novel arguments by employers before this court, the overnight transformation to real concern for the "free choice" of the employees by the employers who make these arguments in such cases never ceases to amaze us. Had this concern which manifested itself in January of 1966 been present after the election of August, 1962, we have no doubt that the tremendous expense involved in this lengthy proceeding could have been avoided. Finally, as noted, we do not feel the company was justified in its new-found doubt or that there will be "imposition of an unwanted union."

16. We also find that the ratification proposal is not a proper subject of collective bargaining negotiations and the respondent's insistence on this aspect of its proposal contravened sections 56 and 14. Employee ratification is an internal trade union affair. There is no statutory requirement that such procedures be adopted, although the good sense lying behind the concept of ratification has been commented on by this Board in the past and is well understood in the industrial relations community. See *George Magold et al*, [1975] OLRB Rep. Oct. 758. See also *Hochens Market*, *supra*, and *Barry Co.*, *supra*. A trade union that "keeps its employees in the dark" runs the risk of having its conduct challenged under section 60 of *The Labour Relations Act* and being the subject of an application for the termination of bargaining rights.

17. The Act therefore provides a complete code of rights directly to employees to deal with an unresponsive bargaining agent. An employer has no role to play in such matters and, indeed, is expressly prohibited from having any material involvement. See sections 12, 40 and 56. Moreover, on the evidence before us, the respondent's conduct does not support its professed concern for the awareness of its employees. While we have no direct evidence of the existence or actual number of telephone calls from employees alleged to have been received by



the respondent, the respondent took no steps (other than in its contract proposal) to apprise the complainant of its concern in this area or to inform employees itself. There is nothing in *The Labour Relations Act* that prevents proper communications between an employer and its employees in the course of bargaining. See *Fruehauf Trailer Company of Canada Ltd.*, [1975] OLRB Rep. Jan. 77. Moreover, given the substantial employee turnover; the hiring of strike replacements; and the respondent's earlier unlawful conduct, it would be surprising if communications between the complainant trade union and many bargaining unit employees were not somewhat strained and incomplete. In our view, any lack of communication is a problem directly contributed to by the respondent's earlier refusal to recognize the complainant and bargain in good faith has compounded the problem and now justifies many of the directions the complainant requests in this area.

18. Finally, we find that the respondent's purpose in proposing Part IV was to provide the bargaining unit employees with an opportunity to reject or accept *the complainant* trade union and not the proposed contract. It is simply non-sensical for an employer to request such a procedure when the bargaining agent has already expressed its intention to accept the contract. What is the more likely reason for insisting on employee ratification in such circumstances? Is the employer genuinely concerned that the contract is not sufficiently attractive or "rich" to be acceptable to the employees? For example, if the contract was rejected after an employer's insistence on a ratification vote, would that employer seriously intend to substantially improve the rejected offer? Clearly, it is within the unilateral power of an employer to improve his offer any time he wishes without need for a ratification vote. In our view, the much more probable reason for an employer (and this respondent) to insist on a ratification vote of employees even after the bargaining agent has agreed to the offer on their behalf, is to provide an opportunity to the employees to reject their bargaining agent and undermine the very basis to collective bargaining. The respondent failed to adduce any compelling evidence to rebut this inference of anti-union intent. From this perspective, the contract proposal clearly violated sections 14, 56 and 58.

19. Having regard to all of these findings, we conclude that Part IV of the respondent's offer of December 3, 1980 was unlawful and is to be severed from the rest of its offer of that date. We further find that the complainant trade union accepted all lawful aspects of the offer and that the respondent and complainant entered into a legally binding and enforceable memorandum of agreement on December 3, 1980. In the circumstance, the complainant is entitled to a direction that the respondent execute the collective agreements which arise from the said agreement. This is not a case of the Labour Board imposing collective agreements on the parties which the Labour Board has fashioned. We have declined to grant such a remedy in the past and our reasons need not be reviewed here. See *Radio Shack*, [1979] OLRB Rep. Dec. 1220. Rather, this is a case where the parties themselves have arrived at an agreement when all lawful elements of their conduct are considered. A remedy ensuring that they honour this consensus is clearly consistent with the scheme of the Act and necessary to maintain its integrity. See *Municipality of Casimer, Jennings and Appleby*, [1978] OLRB Rep. June 507; *Selinger Wood Limited et al*, [1980] OLRB Rep. Nov. 1688; and *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583.

20. Accordingly, having regard to all of the above, the Board issues the following remedy:

- a) The Board declares that the respondent has violated sections 14, 56 and 58 of *The Labour Relations Act*.

- b) The Board directs that the respondent cease and desist from further violations of *The Labour Relations Act*.
- c) The Board directs that the respondent forthwith execute collective agreements incorporating all matters agreed to on December 3, 1980 for all certified bargaining units.
- d) The Board directs the Respondent to pay to all bargaining unit employees all monetary losses arising from the loss of opportunity to negotiate a collective agreement together with interest from November 25, 1980 until the date that the respondent executes the aforesaid collective agreements.
- e) The Board direct the respondent to post copies of the attached notice marked "Appendix" after being duly signed by the respondent's representative in conspicuous places at its places of business where bargaining unit employees are employed and to keep these notices posted for 60 consecutive days. Reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to all such premises shall be given by the respondent to two representatives of the complainant to satisfy itself that this posting requirement has been and is being complied with.
- f) The respondent is directed, at its own expense, to mail a copy of the attached notice marked "Appendix" after being duly signed by the respondent's representative, to the residence of each employee in the said bargaining units forthwith.
- g) The respondent is directed forthwith to provide the complainant with a list of names and addresses of all the employees employed in all bargaining units represented by the complainant and to keep this list updated for the duration of the collective agreements entered into. The request is justified under section 14 as essential bargaining unit information to permit the complainant to communicate with all employees it represents in the most reasonable and complete manner. In addition, the employer's misconduct in this case is likely to have inhibited other forms of communication that might have been available to the complainant.
- h) The respondent is directed to provide the complainant for the duration of one year from the receipt of this decision with reasonable access to all employee notice boards (if any) located at all bargaining unit locations for the posting of union notices, bulletins and other union business literature in order that the employees may have free and ready access to information in the workplace from the complainant concerning all aspects of collective representation and collective bargaining negotiations.

**CONCURRING DECISION OF F. W. MURRAY:**

1. I concur in the decision reached by the majority. I wish to merely add the observation that, in my view, the employer in *Wilson Automotive Belleville Ltd.*, [1980] OLRB Rep. Sept. 1337; partial dissent, [1980] OLRB Rep. Oct. 1574, had real justification in asking for a ratification vote among the employees in the bargaining unit.

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The Labour Relations Act

# NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

We have issued this notice in compliance with an Order of the Ontario Labour Relations Board issued after a hearing in which both the Company and the Union had the opportunity to present evidence. The Ontario Labour Relations Board found that we violated the Ontario Labour Relations Act and has ordered us to inform our employees of their rights.

The Act gives all employees these rights:

To organize themselves;

To form, join or help unions to bargain as a group, through a representative of their own choosing;

To act together for collective bargaining;

To refuse to do any and all of these things.

We assure all of our employees that:

WE WILL NOT do anything that interferes with the United Steelworkers of America as the certified bargaining agent representative of our employees.

WE WILL execute collective agreements with the United Steelworkers of America incorporating all matters agreed to on December 3, 1980 for all certified bargaining units as directed by the Board.

WE WILL make whole all bargaining unit employees who suffered losses by reason of our failure to bargain in good faith as found and directed by the Board.

WE WILL comply with all other directions of the Ontario Labour Relations Board.

FOTOMAT CANADA LIMITED

Per: (Authorized Representative)

**This is an official notice of the Board and must not be removed or defaced.**

DATED this 13th day of February, 1981.

**2209-80-R Group of Employees, Applicant, v. Hotels, Clubs, Restaurants and Tavern Employees' Union, Local 261, Respondent, v. Fuller's Restaurant, Intervener**

**Termination – Failure to commence bargaining within 60 days from giving notice – Respondent union filing reply but not appearing at hearing – Whether Board terminating without vote**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members M. J. Fenwick and R. W. Redrod.

*APPEARANCES:* Michael Gordon, Shelley Chapman and Doris Saueracker for the applicant; no one appearing for the respondent; C. E. Humphrey and M. Lalonde for the intervener.

**DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER R. W. REDFORD:** February 20, 1981

1. This is an application under section 51(2) of *The Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

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3. The application was filed with the Board on January 16, 1981. The respondent sent an unsigned reply to the Board by registered mail on January 29, 1981. Although the respondent was duly notified that the hearing of this application by the Board would take place at the Board Room, 400 University Avenue, Toronto, Ontario, on Friday the 13th day of January, 1981 at 9:30 o'clock in the forenoon (E.S.T.), no one appeared on behalf of the respondent when the case was called. As a matter of courtesy, the Board recessed the hearing for one-half hour in view of the possibility that the representative(s) of the respondent might have been delayed. When no one had appeared on behalf of the respondent by the time the hearing resumed, the Board proceeded to hear the application.

4. Section 51(2) of the Act provides:

“Where a trade union that has given notice under section 13 or section 45 or that has received notice under section 45 fails to commence to bargain with sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargain unit.”

5. It is a matter of record that the respondent was certified by decision and certificate dated September 30, 1980 in File No. 0153-79-R (*Fuller's Restaurant* [1980] OLRB Rep. Sept. 1289) as the bargaining agent for the following bargaining unit:

“All employees of Fuller's Restaurant working at 809 Richmond Road, Ottawa, Ontario, who are regularly employed for not more than twenty-

four (24) hours per week and students employed during the school vacation period, save and except assistant managers, management trainees, kitchen managers and persons above those ranks, and office staff.”

6. This application was filed by a group of employees in the bargaining unit. Having regard to all of the evidence before it, the Board finds that on or about November 3, 1980, the respondent gave the intervener written notice under section 13 of its desire to bargain with a view to making a collective agreement. The Board further finds that the respondent failed to commence to bargain within sixty days from the giving of notice (and had not commenced to bargain as of the date of the hearing of this matter). The sixty-day period preceded the making of this application. No official or other representative of the respondent appeared at the hearing to give evidence concerning its failure to commence bargaining within sixty days from the giving of notice under section 13. Although two (Form 15) notices of this application were posted in conspicuous places on the intervener's premises, none of the employees in the bargaining unit sent to the Board a statement of desire to make representations in opposition to this application.

7. The two employees in the bargaining unit who testified in support of the application told the Board that they have never at any time been contacted by the respondent nor been asked to attend any meeting of the respondent to discuss collective bargaining proposals. It was also their evidence that they have received no correspondence or other communication whatever from the respondent.

8. The purpose of section 51(2) is to protect the employees (and, in a proper case, the employer) against a union which stakes out a claim to represent certain employees, serves notice to bargain on the employer and then fails to commence to bargain within sixty days thereafter, thereby sleeping on its bargaining rights and neglecting to forward the interests of those employees. As has been indicated by the Board in numerous cases, section 51 should not be used to penalize a union but rather to afford an opportunity for an interested party to bring the material facts to the attention of the Board so that the Board can call upon the trade union to provide an explanation for the failure to commence (or continue) bargaining. (See, for example, *Trizec Equities Limited*, [1978] OLRB Rep. Feb. 189, and the Board jurisprudence cited therein.)

9. The Board has generally exercised its discretion under section 51(2) to terminate bargaining rights without a vote where the trade union fails to file a reply and appear at the hearing to provide a satisfactory explanation for its failure to commence (or continue) to bargain within the time period specified in section 51(2). (See *Lakeview Pure Milk Dairy Ltd.*, [1962] OLRB Rep. Dec. 380; *Brunswick of Canada Limited*, [1966] OLRB Rep. Feb. 824; *Deerfield Plastics Limited*, [1967] OLRB Rep. Nov. 778; *West End Chrysler Dodge*, [1968] OLRB Rep. Nov. 839; *Interchem Presstite Limited*, [1969] OLRB Rep. Apr. 99; *Canadian Silk Manufacturing Co. Ltd., North Bay*, [1970] OLRB Rep. Mar. 1458; *Wegu Canada Inc.*, [1976] OLRB Rep. Feb. 7; and *Canwood Lachute*, [1979] OLRB Rep. Dec. 1140; cf. *Faultless Casters Limited*, [1963] OLRB Rep. Nov. 459.) Moreover, in a case which was substantially similar to the instant case, the Board terminated a trade union's bargaining rights without a vote where the trade union filed a reply but did not attend at the hearing to give any explanation for having allowed a period of sixty days to elapse during which it had not sought to bargain (see *Army, Navy and Airforce Veterans in Canada – Fort William Unit No. 257*, [1967] OLRB Rep. Aug. 457).



10. Having regard to all of the circumstances, the Board is of the view that this is an appropriate case in which to exercise its discretion under section 51(2) to terminate the respondent's bargaining rights without a representation vote. Accordingly, the Board hereby declares that the respondent no longer represents the employees of the intervener in the bargaining unit set forth above, for whom the respondent has heretofore been the bargaining agent.

The decision of Board Member M. J. Fenwick will be issued at a later date.

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**0268-80-U Great Lakes Forest Products Limited, Complainant, v. International Brotherhood of Electrical Workers, Local 1565, Respondent.**

**Practice and Procedure – Section 79 – Trade Union – Employee crossing picket line denied union membership – Whether denial of membership per se violation of section 38(2) – Whether Board has power to direct union to admit to membership**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**APPEARANCES:** *F. J. W. Bickford and W. J. Murray for the complainant; J. D. McInnis, L. Oryniak, J. Fiorito and N. Gava for the respondent.*

**DECISION OF THE BOARD;** February 20, 1981

1. This is a complaint under section 79 of *The Labour Relations Act* in which the complainant employer ("the company") alleges that the respondent trade union ("Local 1565") has violated section 38(2) of the Act.

2. At the hearing, the parties agreed to certain facts and also agreed that the Board could rely on the facts set out in the Board's decision in File No. 1885-78-U dated July 5, 1979. The parties further agreed that the Board should refrain from making any actual determination as to whether or not Local 1565 had violated section 38(2) as alleged, but that instead the Board should set out for the benefit of the parties, the law applicable to the following fact situation.

3. Local 1565 represents electricians and electricians' apprentices employed by the company in Thunder Bay. The company has collective agreements with a number of other trade unions covering employees at the same location.

4. On September 20, 1978, employees represented by Local 1656 commenced a legal strike against the company. The strike ended seven days later when the union and the company reached agreement on the terms of a new collective agreement. During the strike, large numbers of the company's employees represented by the Canadian Paperworkers Union, Local 39, who were not in a legal strike position, passed through Local 1565's picket line. Included among these employees were Patrick Gain and David Smith.

5. In August of 1978, both Mr. Gain and Mr. Smith had applied to be transferred to the company's electrical department as apprentices. In October of 1978 the company advised them that their applications had been accepted and that they were to commence their new duties on October 16, 1978. In their new positions, both Mr. Gain and Mr. Smith would come within the bargaining unit represented by Local 1565.

6. Mr. Smith and Mr. Gain worked in the electrical department without any incident from October 16 until November 22, 1978, although partway through this period it was indicated to them that they might not be taken into membership in Local 1565 because they had crossed the Local's picket line during the strike. The Collective Agreement between the company and Local 1565 provides that employees under the agreement "shall become members of the union within six (6) months after entering the company's employ."

7. On November 22, 1978, Messrs. Smith and Gain applied for membership in Local 1565. On November 28, they were advised that their applications had been rejected. From that day onward members of the Local, including the President of the Local, refused to work with either Mr. Smith or Mr. Gain. On December 7, 1978, both Smith and Gain decided they could no longer work in such an environment and accordingly, they requested that the company transfer them back to their old jobs, which request, was granted.

8. Mr. Gain and Mr. Smith subsequently filed a complaint with the Board (File No. 1885-78-U) alleging that Local 1565 had breached sections 38(2) and 60 of the Act because of the way they had been treated while employed as a electricians' apprentices. The Board issued a decision in the matter on July 5, 1979 (see, *Great Lakes Forest Products Limited*, [1979] OLRB Rep. July 651.)

9. With respect to the alleged violation of section 38(2), the Board had the following to say:

"28. The issue before us is whether the circumstances constitute a contravention of section 38(2) which prohibits a trade union from requiring the employer to discharge an employee for non-compliance with a requirement of union membership as a condition of employment, where such non-compliance arises out of the union's removal or refusal of such membership for those reasons enumerated in sections 38(2)(c), (d), (e), (f) and (g).

29. The collective agreement between Great Lakes and Local 1565 in Article 5 requires all permanent employees to become members of the union within six months after entering the company's employ, and to maintain membership in good standing. Smith and Gain entered the electrical department on October 16, 1978, and under the terms of this Article, could be required to join the union and maintain membership from April 16, 1979, onwards. Prior to April 16, 1979 no membership conditions attached. If the Board were to conclude that the conduct of the union, here, in refusing membership fell within the reasons enumerated in sections 38(2)(c) to (g), there would remain the question as to whether the trade union required the employer to discharge the complainants because of such lack of membership.

30. The relevant provisions of section 38 read as follows:

38.-(1) Notwithstanding anything in this Act, but subject to subsection 4, the parties to a collective agreement may include in it provisions,

(a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade unions;

(b) for permitting an employee who represents the trade union that is a party to or is bound by the agreement to attend to the business of the trade union during working hours without deduction of the time so occupied in the computation of the time worked for the employer and without deduction of wages in respect of the time so occupied;

(c) for permitting the trade union that is a party to or is bound by the agreement to use the employer's premises for the purposes of the trade union without payment therefor.

(2) No trade union that is a party to a collective agreement containing a provision mentioned in clause *a* of subsection 1 shall require the employer to discharge an employee because,

(a) he has been expelled or suspended from membership in the trade union; or

(b) membership in the trade union has been denied to or withheld from the employee,

for the reason that the employee,

(c) was or is a member of another trade union;

(d) had engaged in activity against the trade union or on behalf of another trade union;

(e) has engaged in reasonable dissent within the trade union;

(f) has been discriminated against by the trade union in the application of its membership rules; or

(g) has refused to pay initiation fees, dues or other assessments to the trade union which are unreasonable.

31. Relief pursuant to the section is predicated upon the existence of three elements. There must be a union security clause in force of the kind



contemplated by section 38(1)(a), the trade union, relying on the clause, must have required the employer to discharge the employee and the trade union must have denied membership to the employee for one or more of the reasons proscribed by section 38(2)(c) to (g). The whole thrust of the section is to permit union security provisions but to preclude the trade union from requiring the employer to take action under such clause, thereby interfering with the employment security of an individual, if the reason for the individual's non-membership in the union falls within any of those reasons set out in section 38(2)(c), (d), (e), (f) or (g). The section falls short of interfering with the union's conduct of its internal affairs and at the same time limits the applicability of the results of such conduct within the collective bargaining agreement. It is not the denial of union membership, per se, which the section is directed against but rather that such denial shall not be used as the basis for requiring the employer to apply the union security provisions.

32. In the instant case, the application for relief alleging a violation of the section is premature. The section clearly contemplates a direct causal relationship between the requirement to discharge and the existence of a union security clause. The very use of the word "require" connotes a legal obligation on the employer to accede to the trade union's request. Absent the operation of a security clause, the trade union would be in no position to 'require' any action by the employer and the employer would be under no legal obligation to act upon any request made.

33. Here, the security arrangement did not impose a legal obligation upon either the employees to join the union or the employer to discharge employees failing to obtain membership until some six months following the commencement of work by the employees. During the period of time framed by this complaint, the trade union was without any legal foundation upon which it could compel the complainants' discharges. That time period had not run and the union was not therefore in a position, at all relevant times, to require the discharge of employees pursuant to the contract, and, in fact, the evidence does not establish that the union at any time did require of the employer that discharges be effected in compliance with that clause.

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36. We are of the opinion for the reasons above discussed that we must find no contravention of section 38 has taken place."

10. Turning to the alleged violation of section 60, the Board concluded as follows:

"46. It is clear in this case that Gain and Smith had no action or non-action of the employer about which they would seek to complain and have corrected. Their complaint, if any, must be that they were precluded from performing the work assigned them by their employer by the actions of the respondent, and in the ultimate were forced by the circumstances

created by the respondent to abandon their employment relationship. In our view the complainants had a right to expect that their employment interests would be protected by the respondent and would only be modified to the extent necessary to achieve a legitimate collective goal and then only in a manner which was not arbitrary, discriminatory or in bad faith. The evidence is that the respondent took a number of steps including resort to an unlawful strike to accomplish the demise of the complainants' employment relationship and this, surely, can only be characterized as the antithesis of protecting the complainants' employment interests.

47. It is many times necessary for a bargaining agent to forego advancing the interests of individual employees in the short or long-term interests of the collective whole. It seems to us that if the respondent was here acting for the achievement of any collective interests, such interests can only be identified as being strongly opposed to persons crossing its picket line, or alternatively, that the respondent was seeking the collective good by using the complainants' employment as a lever with the company to halt what the respondent viewed as job erosion within its unit.

48. In respect to the former objective which, in effect, is founded on an objection to the complainants' fulfillment of legal obligations to honour their own collective agreement, it is not in our view a permissible collective objective. In respect to alternative objective relating to job erosion, the respondent had both contract arbitration and a provision in the contract for the settlement of jurisdictional disputes which were available to them and which could have been pursued in place of destroying the complainants' employment interests.

49. In our view, collective objectives of the above type cannot be considered as valid or relevant factors in integrating the complainants' employment interests with the interests of those of the collective whole. Decisions which are based on irrelevant facts or principles are arbitrary within the meaning of section 60 and we therefore find that the respondent has contravened section 60 of the Act.

50. The Board orders and directs that the intervening employer reinstate the complainants in their employment as electrician apprentices upon application for such reinstatement by them. Such reinstatement shall be made effective as soon as the employer has need for the filling of job vacancies in the classification of electrician apprentices.

51. The Board further orders and directs the respondent union, upon reinstatement of the complainants to cease and desist from all conduct which affects the complainants' employment interests differently from that of other persons employed as electrician apprentices."

11. In consequence of the Board's direction set out above, on or about September 5, 1979, Mr. Smith was reinstated in his employment as an apprentice electrician. Presumably Mr. Gain did not desire to return to this position.

12. In March of 1980 Mr. Smith, for the second time, applied for membership in Local 1565 and was again rejected. This rejection appears to have been based on the fact that Mr. Smith had earlier passed through the Local's picket line.

13. The company alleges that subsequent to the rejection of Mr. Smith's second application for membership, the union advised the company of the rejection and also made it clear that the union would not allow Mr. Smith to continue working as an electrician's apprentice. The union, for its part, acknowledges that it advised the company that it had rejected Mr. Smith's membership application, but denies telling the company that Mr. Smith would not be allowed to continue to work, or that the union was seeking his dismissal from the bargaining unit.

14. Shortly after the union turned down Mr. Smith's application for membership, the company removed him from Local 1565's bargaining unit, and rehired him within the bargaining unit represented by Canadian Paperworkers Union, Local 39.

15. In its complaint as filed, the company contended that Local 1565's continuing refusal to take Mr. Smith into membership constitutes a violation of section 38(2) and requested that the Local be directed to now take Mr. Smith into membership. As the Board indicated at the hearing, we have grave concerns as to whether the Board can direct a union to take a particular individual into membership. The working of section 38(2) appears to fall short of interfering with a union's right to decide who to take into membership. What the section does do is protect employees from the application of union security provisions where membership in a union has been denied to them for improper reasons. The Board in its decision of July 5, 1979 stated the point as follows:

"It is not the denial of union membership, per se which the section is directed against but rather that such denial shall not be used as the basis for requiring the employer to apply the union security provisions."

16. Section 38(2) provides that no union that is a party to a collective agreement which requires union membership as a condition of employment shall require the employer to discharge an employee when the employee has been denied union membership for one of a variety of improper reasons. Arguably, a number of these reasons might apply to Mr. Smith's situation. However, on the material before us, at least one of these reasons clearly applies, namely, that Mr. Smith was denied union membership because Local 1565 felt that he had engaged in activity against the Local, namely, crossing its picket line notwithstanding the fact that at the time he was under a legal obligation to do so. Section 38(3) provides that the protections of section 38(2) do not apply to an employee who has engaged in either unlawful activity against a trade union or activity against the trade union that was instigated or procured by his employer. Mr. Smith's conduct did not come within either of these categories. Accordingly, by force of section 38(2), Local 1565 is prohibited by law from requiring that the company discharge Mr. Smith from its bargaining unit on the basis of the fact that the Local refused to take him into membership.

17. Notwithstanding the company's allegation to the contrary, Local 1565 contends that although it advised the company that Mr. Smith's second application for membership had been denied, it did not ask for his dismissal. In essence, the union's position is that the company simply over-reacted to the notification that Mr. Smith's application had been rejected. Whatever the truth concerning what occurred prior to the time the company moved



Mr. Smith out of Local 1565's bargaining unit, it is clear that the Local is not now taking the position that he cannot work in the bargaining unit as a result of his application for membership having been denied.

18. In consequence of the above we see no reason why the company cannot, if it has not done so already, now reinstate Mr. Smith into the bargaining unit represented by Local 1565. Even if the Local continues to refuse Mr. Smith membership, it cannot require the company to dismiss him from the bargaining unit if the refusal is for one of the reasons proscribed by section 38(2)(c) to (g). More particularly, it cannot require that he be discharged if membership in the Local is denied to him because he passed through the Local's picket line at a time when he was represented by another trade union. We also would note that pursuant to section 60 of the Act, the Local will be required to represent Mr. Smith in good faith, even though he is not a member of the union. Further, pursuant to the provisions of section 63(4a) of the Act (enacted as 1980, c. 34, s. 3) Mr. Smith, even though not a member of the Local, will be entitled to participate in any strike vote or vote to ratify a proposed collective agreement. It also may be that the Local will reconsider its position and take Mr. Smith into membership. Indeed, we would urge that it do so.

19. Having regard to the agreement of the parties referred to above concerning how the Board should deal with this complaint, these proceedings are hereby terminated.

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**1568-80-R United Steelworkers of America, Applicant, v. Homeware Industries Limited, Respondent, v. Group of Employees, Objectors.**

**Certification – Section 7a – Management suggesting and supporting “employee committee” – Whether employer violations affecting employee ability to express true wishes at vote – Whether later employer conduct curing effect of earlier threats**

**BEFORE:** Ian C.A. Springate, Vice-Chairman, and Board Members T.G. Armstrong and A. Hershkovitz.

**APPEARANCES:** *Gerry Reeds and Gay Lamb for the applicant; T. Peter Drake, Ruben Wiseman and John Robertson for the respondent; Sylvia J. Hall, Judy A. Rutledge, Beverley Smith and Patty Breedon for the objectors.*

**DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER T.G. ARMSTRONG:** February 2, 1981

1. This is an application for certification.
2. We find that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. Having regard to the agreement of the parties, we further find that all employees of

the respondent at Tottenham, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. We are satisfied on the basis of all of the evidence before us that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 5th, 1980, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

5. The applicant's membership position is such as would normally require that it be selected by a majority of employees casting ballots in a representation vote before it could be certified. The applicant, however, submits that the Board should apply section 7a of the Act and certify it without a representation vote being conducted. Section 7a reads as follows:

“Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.”

6. The evidence indicates that the applicant began its organizing campaign on or about October 14th, 1980. On or about October 16th, 1980, two employees went to see Mr. John Robertson, the factory manager at the respondent's plant in Tottenham, and asked if there was an alternative to the employees being represented by an international union. This visit prompted Mr. Robertson on the same day to call two meetings of employees, one for those on the day shift and one for those on the evening shift. At the meetings, Mr. Robertson suggested that employees consider the alternatives to being represented by a international union. He expressed these alternatives as being a “chartered” association” by which he apparently meant an “in-house” union limited only to employees of the respondent or a “non-chartered association”, that is an informal employee committee. Mr. Robertson added that the employees should draw up a list of topics for further discussion and elect people to speak on their behalf at future meetings. During the meetings on October 16th, the employees were also addressed by Mr. Steve Wilson, one of the respondent's foremen. Mr. Wilson stated that with an international union funds from Canadian workers go to support American workers, but that the reverse does not hold true.

7. Following the meetings of October 16th, 1980, a small group of employees decided to conduct a vote among the employees so as to ascertain their preferences concerning union representation. One of these employees, Miss Sylvia Hall, posted two notices in the plant stating that such a vote would be held on Monday, October 20th. A vote was in fact held on that day. Employees on the day shift voted in the respondent's ironing board packing section. Miss Hall, and another employee who worked in that section, Judy Rutledge, ticked off the

names of employees on a list as they voted. Employees arriving for the night shift voted in the lunchroom where the vote was conducted by Miss Hall and another employee, Paddy Breedon. Some of the employees voted on their breaks, but it appears that a majority voted during their working hours. Officials of the respondent were aware that a vote was being conducted but took no steps to stop it or to prohibit employees from leaving their work stations to vote.

8. The employees voted using blank ballots on which they were to indicate whether they desired to be represented by "The International Union", "Factory Workers of Homewood Union", or "no union". When the voting was concluded, the ballots were counted in the presence of a number of employees and John Robertson, the factory manager. The results of the vote indicated that thirty-five employees had marked a preference for the International union, thirty-three employees for the Homewood union, seventeen for no union, and that three ballots had been spoiled.

9. During the morning of November 20th, 1980, Mr. T. Peter Drake, the respondent's Vice-President of operations, became aware of the vote then underway. Mr. Drake then posted a notice to the employees in which he asked that they consider very carefully voting for a union at Tottenham until other alternatives had been tried; such as an employee committee. In the notice, Mr. Drake further indicated that he would like to meet with a number of employee representatives, and he urged employees to give an employee committee a chance.

10. As suggested in Mr. Drake's notice, an employee committee was formed. Mrs. Gloria McCallum, an employee married to one of the respondent's foremen, went around to employees to get their views as to who should be on the committee. This process resulted in a committee comprised of six employees. On or about October 24th, 1980, members of the employee committee met with Mr. Drake, during working hours, at the home of Patty Breedon, one of the employees. At this meeting, one of the employees, Sylvia Hall, raised a number of issues of concern to employees, including proposed improvements to wages and fringe benefits. Mr. Drake indicated he would consider the matters raised by Miss Hall, but stopped short of making any firm commitments. During the meeting with the employee committee, one employee present, Jim Pizzezy, asked Mr. Drake questions concerning the respondent's plant in Beaverton, Ontario, and also about the views of Mr. O'Hara, the respondent's Chairman of the Board, concerning union representation.

11. The respondent operates a number of plants other than the one in Tottenham. The employees at one of these plants in the Downsview area of Metropolitan Toronto, have for some time been represented by the applicant trade union. The same union had just shortly prior to the events set out above applied to be certified to represent employees at the respondent's plant in Beaverton. At one point during the applicant's organizing campaign, Mr. P. Carney, one of the respondent's foremen, discussed the Beaverton plant with a number of employees. Mr. Carney advised Larry Johnston that "George" in quality control had told him the Beaverton plant had closed. Mr. Carney told Kathy Dakin and Veronica Majors that the Beaverton plant had closed due both to the union and the fact that it was not producing enough. Mr. Carney also raised the matter with Charles Ireland, an employee who had been very active in the applicant's organizing campaign and who had signed up a number of employees. According to Mr. Ireland, Mr. Carney told him that he had been advised that the Beaverton plant had shut down because the union had got in, and asked if this was true.



Mr. Ireland stated that his response was that the Beaverton plant had not closed, and that the union had not yet actually certified at Beaverton. At the meeting with the employee committee on October 24th, Mr. Pizzey, asked Mr. Drake if the Beaverton plant had closed, to which Mr. Drake replied that no decision had been made to close the plant.

12. The matter of Mr. O'Hara's views arose after Mr. Robertson's meetings with the employees on October 16th, 1980. At those meetings, Mr. Robertson indicated that two of the options open to the employees were a "chartered organization", or union limited to the respondent's employees and an employee committee. As already noted, a "Homewood Union" was one of the options employees could choose in the voting conducted on October 20th. However, at about this time, Mr. O'Hara met with representatives of the applicant union, presumably with respect to one of the respondent's other plants. Mrs. Lamb, a representative of the applicant who headed up the applicant's organizing campaign at Tottenham, testified that although she had not attended this meeting she had been advised that at the meeting, Mr. O'Hara stated that he would deal with the Steelworkers but not with an informal employee committee. Mrs. Lamb further testified that she had advised certain bargaining unit employees that Mr. O'Hara would prefer to deal with the Steelworkers rather than an employee committee. On October 21st, 1980, the day after the vote, Mr. Pizzey, one of the employees, stated in the staff cafeteria that Mr. O'Hara preferred the Steelworkers Union or nothing. The matter was later raised by Mr. Pizzey when the employee committee met with Mr. Drake. Mr. Drake at the time indicated that Mr. O'Hara was prepared to deal with an international union, preferably the Steelworkers, or an informal committee, but not with an "in-house" trade union.

13. For the Board to apply section 7a of the Act, it must be satisfied that the respondent has violated the Act. We are satisfied that management's action in proposing the establishment of an employee committee where none had existed before, and then dealing with the committee with respect to working conditions, was done so as to draw employee support away from the applicant trade union and towards the committee. We view this as a form of employer interference in the selection of a trade union by employees contrary to section 56 of the Act. In addition, we are of the opinion that Mr. Carney's comment to Miss Dakin and Miss Majors that the Beaverton plant had closed due in part to the union carried with it an implied threat that the respondent might also close its plant at Tottenham if the applicant were to be selected by the employees as their bargaining agent. In our view, this type of threat also amounted to employer interference with the selection of a trade union contrary to section 56.

14. For a trade union to be certified under section 7a, it is not sufficient that the Board conclude that the employer has contravened the Act. Rather, in a case such as this, the Board must also be satisfied that the true wishes of employees are not likely to be ascertained by way of a representation vote. In the instant case, the statements and actions of Mr. Robertson and Mr. Drake would have made it clear to employees that the respondent did not desire to have its employees represented by a trade union and that the respondent would prefer to deal with its employees through an employee committee. However, the respondent's preference in this regard is not likely to have come as a surprise to any reasonable employee. Employees do not expect employers to welcome the unionization of their work forces and a clear indication of this fact by an employer, standing by itself, is not likely to have an unduly coercing influence on employees. The matter takes on a different complexion, however, in those situations where management goes further and also indicates to employees that the selection of a trade union will put their continued employment in jeopardy. In the instant case, nothing

said or done by either Mr. Robertson or Mr. Drake would have caused a reasonable employee to be concerned that support for the applicant might result in loss of his employment. Mr. Carney's statements, however, to the effect that the Beaverton plant had closed down in part because of the union did in fact link unionization with a loss of employment.

15. Under other circumstances, statements like those made by Mr. Carney, when coupled with active management support for an employee committee, might well give rise to a conclusion that the true wishes of employees would not likely be ascertained in a representation vote. In this case, however, certain other considerations come into play. First of all, the statements were made by Mr. Carney, a foreman. Not only did more senior management not repeat the statements, but when the matter was raised with Mr. Drake, Vice-President of the respondent, Mr. Drake indicated that the Beaverton plant had not been closed. Further, it is reasonable to assume that over time employees would have become aware of the fact that the Beaverton plant had not been closed but was still operating. Employees would also likely be aware of the fact that for some time employees at the respondent's plant in Downsview have been represented by the applicant trade union. In addition to all this, certain employees were advised that the respondent's Chairman of the Board had indicated a willingness to deal with the applicant trade union. When all of these considerations are taken into account, we feel that if the applicant trade union is given an opportunity to address employees during their working hours so as to provide it with an opportunity to counter the effect of the respondent's earlier interference with employee rights through its support for the employee committee, and with the posting of the attached notice, made an appendix to this decision, employees will in fact be able to express their true wishes in a representation vote conducted by the Board.

16. The respondent is to post the attached notice on all employee bulletin boards in its plant in Tottenham and to leave such notices posted uncovered by any other material, until the conclusion of the representation vote. The respondent is to provide two representatives of the applicant with an opportunity to address the bargaining unit employees, on both the day and night shifts, during working hours for at least an hour and a half. If any difficulties are encountered in making the arrangements for the applicant's representatives to address the employees, the Board will determine the arrangements on application by the applicant.

17. The respondent is directed to cease and desist from making any threats of closing its plants as a result of its employees deciding to be represented by a trade union, and also to cease and desist from supporting an employee committee as a way of seeking to draw employee support away from the applicant trade union.

18. We direct that a representation vote be conducted among the employees of the respondent. Those eligible to vote are all employees in the bargaining unit on the date hereof who do not voluntarily terminate their employment, or who are not discharged for cause between the date hereof and the date the vote is taken.

19. Voters will be asked to indicate whether or not they desire to be represented by the applicant in their employment relations with the respondent.

20. The matter is referred to the Registrar.

**DECISION OF BOARD MEMBER A. HERSHKOVITZ;**

1. I concur with the statement of facts as presented in the decision of the majority members of the Board.
  2. I wish to bring particular attention to the enumeration of violations on the part of the respondent and their representatives as appears in paragraph 13 of the majority report. I further agree with the majority where they state in paragraph 13: "We view it as a form of employer interference in the selection of a trade union by the employees contrary to section 56 of the Act".
  3. Because of the cumulative effect of the aforementioned violations, I find that a vote in this environment cannot be a true expression of the desires and wishes of the employees of the bargaining unit.
  4. It has been demonstrated that not less than forty-five per cent of the employees are members of the applicant trade union.
  5. Because of the evidence adduced before the Board, I must conclude that a clear case has been made out for the application of section 7a of the Act and would recommend that a formal certificate be granted.
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Appendix  
The Labour Relations Act

# NOTICE TO EMPLOYEES

## Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS,

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS;

TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE OUR EMPLOYEES THAT:

WE WILL NOT ENGAGE IN ANY CONDUCT WHICH INTERFERES WITH THE ORGANIZATION OR ADMINISTRATION OF THE UNITED STEELWORKERS OF AMERICA.

IF THE ONTARIO LABOUR RELATIONS BOARD CERTIFIES THE UNITED STEELWORKERS OF AMERICA, WE WILL BARGAIN IN GOOD FAITH WITH THE UNION AND MAKE EVERY REASONABLE ATTEMPT TO MAKE A COLLECTIVE AGREEMENT.

WE HAVE NOT CLOSED, NOR DO WE INTEND TO CLOSE, OUR PLANT IN BEAVERTON BECAUSE EMPLOYEES AT THAT PLANT HAVE CHOSEN TO BE REPRESENTED BY THE UNITED STEELWORKERS OF AMERICA.

WE WILL NOT TAKE ANY ACTION AGAINST EMPLOYEES AT TOTTENHAM BECAUSE OF THEIR SUPPORT FOR THE UNITED STEELWORKERS OF AMERICA.

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HOMEWARE INDUSTRIES LIMITED

PER: (AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced.**

**2126-80-R** Teamsters, Chauffeurs, Warehousemen and Helpers Local No. 91 affiliated with the International Brotherhood of Teamster, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Intercity News Company Limited**, Respondent, v. Group of Employees, Objectors.

**Certification – Petition – No person with personal knowledge of origin and circulation of petition appearing to testify – Whether Board accepting petition as voluntary**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members C. G. Bourne and B. Armstrong.

***APPEARANCES:** Ken Petryshen and Don Swait for the applicant, Allen Craig, Hugh Curry, Paul Munroe and Anneli Talvila for the respondent, Kenneth Bird for the objectors.*

**DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER B. ARMSTRONG; February 24, 1981**

1. This is an application for certification.

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4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent working in Ottawa, Ontario, save and except the terminal manager, those above the rank of terminal manager and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. Based on the list of employees filed by the respondent and the bargaining unit described above, the Board is satisfied that there are six employees in the unit. the applicant has filed five acceptable membership cards, all of which correspond with the names of employees on the respondent's list. These cards demonstrate membership support for the applicant in excess of fifty-five per cent of the bargaining unit, sufficient for the applicant to be certified without a vote. There is, however, a duly filed statement in opposition to the application (a petition). The petition contained the signatures of four persons, three of whom previously signed membership cards in the applicant. Therefore, if the petition represents the voluntary wishes of the persons who signed it, it would normally cause the Board to exercise its discretion under section 7(2) of the Act to direct that a representation vote be held. There was also filed with the Board a handwritten statement bearing one signature of a person purporting to be an employee of the respondent who had signed the petition and who had also signed, prior to that, a membership card in the applicant. The statement was a revocation of the petition and a reaffirmation of the application for membership in the applicant. If this statement is voluntary, it would have the effect of reducing by one the number of persons who signed both the petition and membership cards. That is still sufficient, however, to reduce the applicant's apparent membership support below the level required for certification without a representation vote. The parties were so advised at the hearing. They were advised also that the Board would conduct its usual inquiry into the origin, preparation, circulation and filing with the Board of the petition in order to determine whether it represented the voluntary wishes of the employees who signed it.

6. Since the sequence of events in respect of the filing of the application and of the reply and other documents filed as a result of it have some significance for what took place at the hearing, the Board finds it useful to review the sequence and manner in which these various documents were filed. The application was made January 6, 1981 by registered mail and was received by the Board on January 7th. That same day it acknowledged receipt of the application and sent notice to the respondent together with copies of a Notice to Employees in the customary form, with direction to the respondent to post these notices. By the same means, the Board advised the applicant, respondent and employees that it had set a terminal date of January 16th for the application and a hearing date of February 6th. The application described the bargaining unit as set out above. On January 14th, the Board received a telex from the applicant seeking to amend the bargaining unit description to exclude office staff. The respondent was notified by telephone the same day and by a confirming letter mailed that day instructing the respondent to post a copy of the telex adjacent to the Notice to Employees.

7. On January 16th the Board received the petition referred to above dated and mailed registered on January 15th. The petition was acknowledged and the other parties advised of it on the same day that it was received. the parties were advised that the petition was in the following form:

January 15, 1981

We, the undersigned, are opposed to the Application for Certification and Hearing between Teamsters, Chauffeurs, Warehousemen & Helpers Local Union No. 91 and the Employees of Intercity News Company Limited.

(4 Signatures) \_\_\_\_\_

(4 Names)

I, (Name), desire to represent the above named to the Board in opposition to the Application for Certification and Hearing between Teamsters, Chauffeurs, Warehousemen & Helpers Local Union No. 91 and the Employees of Intercity News Company Limited.

(Signature) \_\_\_\_\_

(Name)

(Address)

(Phone Number)

8. A reply to the application from the respondent, dated January 14th, 1981 and mailed registered on January 16th, was received by the Board on January 19th. The reply indicates that the respondent agreed with the bargaining unit description contained in the application. The reply was accompanied by the respondent's list of the employees, five in number, included in that bargaining unit. The reply was acknowledged the same day that it was received and a copy of it was sent to the applicant. On January 20th, the Board received, hand delivered, a corrected reply dated January 15th from counsel for the respondent, together with a corrected list of employees, still five in number. the name of one employee had been deleted and another added. The corrected reply indicated that the respondent still



agreed with the bargaining unit described in the application as originally filed. The revocation and reaffirmation referred to above, dated January 15th, was mailed registered on January 16th and received by the Board on January 22nd. The following day its receipt was acknowledged and the other parties were advised of the form of the document. On January 28th the Board received, hand delivered, a letter from respondent counsel advising of a sixth name to be added to the list of employees.

9. Finally, a letter dated February 4th from the applicant was received, hand delivered on February 5th, alleging that the respondent was involved in the instigation and circulation of the petition. Respondent counsel was immediately advised of the letter and on the same date, February 5th, delivered to the applicant a demand for particulars.

10. At the hearing into the application on February 6th, the applicant and the respondent advised the Board that they were agreed to the bargaining unit description contained in the original application. the Board ascertained from Kenneth Bird, who represented the objectors at the hearing, that he had no objection to that description of the unit. the Board, therefore, accepted the agreement of the parties as noted in paragraph 4 above. The Board was advised by the applicant, prior to the Board embarking on its inquiry into the petition, that the applicant was withdrawing the charges contained in its letter dated February 4th about the respondent being involved in the origin and circulation of the petition.

11. Kenneth Bird told the Board that the petition had been prepared and typed by one of the other three employees who had signed it after having discussed the wording of the head note on the petition with Bird. The other two persons who signed the petition were not present during that discussion, nor was Bird present when the petition was typed. Bird signed the petition but did not witness its signing by the other three persons. The petition was not sent to the Board by Bird and he was not present when it was mailed. It was decided that he would represent the petitioners at the hearing when it became evident that the other three would be unable to attend. This decision was made prior to the sending of the petition to the Board and it was Bird's name that appeared in the statement which is set out on the petition below the signatures. The Board's acknowledgement of the petition was made to Bird and with it he received a copy of the Board's booklet "Guide to The Labour Relations Act." There was no further discussion amongst the four petitioners as to who would appear on their behalf at the hearing, whether to represent them or to testify on their behalf. Bird was not certain when he learned of the union's request to amend the description of the bargaining unit. While he thought it was around January 16th, the respondent advised the Board at the hearing that the notice of change had been posted on receipt from the Board on January 19th. In view of the date that it was mailed by the Board, the latter date is the more likely time when Bird became aware of the change. He told the Board that he did not approach the other three petitioners to discuss the import of that change or whether it would affect their representation at the hearing, nor did the others approach him in that respect.

12. It was evident during the Board's examination of Bird that he was not a party to significant aspects of the origin, preparation, circulation and filing with the Board of the petition and he admitted this fact. He had advised the Board also that he had no other witnesses to testify as to the events giving rise to the petition being filed with the Board. In view of these circumstances and having regard for the Board's requirement that it be able to assess whether the petition is voluntary from the personal knowledge and observation of the persons testifying as to the origin of the petition and the manner in which each signature was obtained,

the Board terminated the examination of Bird at this stage and asked for the submissions of the parties on the exercise of the Board's discretion under section 7(2) of the Act.

13. Bird, for the objectors, took the practical approach that a representative vote would allow the employees to express secretly their wishes about representation by the applicant and would dispel the problems created by the gaps in the evidence about the origin, preparation, circulation and filing of the petition with the Board.

14. Respondent counsel submitted that, from the point of view of fairness to the objectors, the circumstances of this case make it a classic example of one where the Board should exercise its discretion and direct that a representation vote be held in spite of the applicant's apparent support being in excess of fifty-five per cent. He based his submissions on two grounds. First, having regard for the applicant's vacillation about the proper description of the bargaining unit which it was seeking, if a representation vote was directed and held with expedition, employees would know for the first time what was the ultimate bargaining unit being applied for and after the usual campaigning would be able to make a proper choice as to whether they wished to be represented by the applicant for that unit. Second, a vote would dispel any cloud over the application resulting from:

- (a) the various changes in the bargaining unit description;
- (b) any question of whether those changes impacted on the petitioners' choice of their representative at the hearing and what witnesses would be required to satisfy the Board of the voluntary nature of the petition;
- (c) the revocation and reaffirmation mailed to the Board on the terminal date of the application and about which the Board deemed it unnecessary to hear evidence; and
- (d) the applicant's charges concerning the respondent which were filed almost on the eve of the hearing and then withdrawn at the hearing.

15. The Board has expressed its concern in many decision dealing with petitions about gaps in the evidence as to the origin of the petition and the manner in which the signatures were obtained and the effect of those gaps on the Board's determination of whether a petition is voluntary. This concern has been expressed both where the Board had found petitions to be voluntary and where it has found the contrary and whether the petition was dealing with an application to create or terminate bargaining rights. In a recent decision, *Royal Hydrofoil Cruises (Canada) Limited*, Board File No. 0795-80-R, as yet unreported, which issued November 12, 1980, the Board had to deal with a difficult problem created by gaps in the evidence before it pertaining to a petition in an application for certification. that decision contains the following cogent statements about the problem of determining whether a petition is voluntary when it is faced with gaps in the evidence about the petition.

"As stated in the *Pigott Motors* case, 63 CLLC ¶16,264:

'In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify

himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.'

As the above passage illustrates, the Board's concern in any representation application is in ascertaining the true wishes of the employees. In assessing an employees' statement of desire the issue is simply one of *voluntariness*, whether in the context of the Board exercising its discretion under section 7 of the Act, or of an application for termination under section 49, where the word "voluntarily" is specifically used. Gaps in the evidence, or the involvement of management in a petition (whatever else may be its consequences) are relevant to the Board's inquiry in a representation context to the extent that they affect the Board's determination on the fundamental issue of voluntariness (see *Fuller's Restaurant*, [1979] OLRB Rep. May 395). Where management *has* been involved, of course, the Board has historically been prepared to draw liberal inferences that that fact may have been known generally to employees. It is, however, because the sole issue is voluntariness that the Board finds itself constrained to disregard an employee petition not only when it concludes that the voluntariness of employee acts may have been affected by the *actual* involvement of management, but where it may have been affected by no more than a *perceived* involvement (see, e.g., *Morgen Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813). It is the reasonable perception of the employees that the Board must assess.

In a 'petition' case, therefore, the Board requires sufficient evidence before it to enable it to make this assessment. Hence the Board's Rules, in section 48, contain the following caution:

'48.-(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.'



and this is reflected in the *Notice to Employees* (Form 5) as well. These are not technical standards of evidence; they simply reflect the reality that when all of the evidence is in, the Board has to be satisfied that any employee statement being relied upon is voluntary. In this regard, the Board in *Fuller's Restaurant, supra*, had this to say:

'18. The Board has held that the requirement for first-hand evidence of the 'circumstances surrounding the origination, preparation and circulation of a statement of desire places an onus on those wishing to establish the voluntariness of the statement to call evidence of how each of the signatures was obtained as well as evidence detailing the physical preparation and the actual delivery of the document to the Board'. (See *Formosa Spring Brewery*, [1974] OLRB Rep. Oct. 696.) Because the onus is on the petitioners to satisfy the Board as to the voluntariness of the statement, and because the signing of a statement against the union after signing a card in support represents a sudden change of heart, any gap in the evidence from preparation to delivery to the Board may prove fatal in any given case. It is for this reason that the Board has put petitioners on notice as to the extent of the evidence which may be required. A gap in the evidence relating to the delivery of the statement to the Board when considered in conjunction with other gaps in the evidence relating to custody of the document or in conjunction with evidence suggesting company involvement may cause the Board to find that it has not been satisfied as to the voluntariness of the statement. . . ."

16. The reference in *Royal Hydrofoil, supra*, to the *Notice to Employees* (Form 5) is reference to the following cautionary statements which appear in that notice following instructions setting out what must be contained in any statement in opposition to an application and the time limits within which it must be filed with the Board.

7. Any employee, or group of employees, who has informed the board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.

THE BOARD MAY DISPOSE OF THE APPLICATION WITHOUT FURTHER NOTICE AND WITHOUT CONSIDERING THE STATEMENT OF DESIRE OF ANY PERSON WHO FAILS TO ATTEND.\*

.....

\*EXPLANATORY NOTE: Where employees fail to attend in person or by a representative or to testify or produce witnesses to testify as provided

in paragraph 7 above, the Board normally does not accept the statement of desire as casting doubt on the evidence of membership filed by the applicant.

17. The copy of the Board's "Guide to The Ontario Labour Relations Act" which Bird received, in keeping with the Board's customary practice, contains on page 29 the following information on how employees who have filed a statement in opposition to an application may prove the voluntary nature of that statement:

If the statement of desire will affect the the certification process by forcing the holding of a vote, the Board will call upon the objecting employees to prove that the statement is voluntary. A representative of the signing employees must appear and call witnesses to testify under oath about how the statement of desire originated (who drafted it and where) and about the manner in which each of these signatures was obtained. This means that evidence must be given about the circumstances under which each employee signed the statement of desire by someone who was present at the time. Through all this, the Board makes certain that the names of the employees on the statement of desire are not revealed to the employer or the union. Reference is made only to a number placed beside each of the signatures by the Board. The people who present this evidence will be questioned by the Board, and may be questioned by the representatives of the union and the employer. If at the end of the enquiry the Board is not satisfied that the statement is a voluntary expression of the employees who signed, it will be dismissed.

18. The cautionary statement on the Notice to Employees is a clear warning of the need for the objectors to establish at the hearing through witnesses who "... testify from ... their personal knowledge and observation, ..." about the origin of the petition and the manner in which each signature on it was obtained. The Board was concerned in this case, that the objecting employees may have been adversely affected in their choice of a representative and witnesses by the applicant's requested amendment to the bargaining unit description. It is clear on the evidence that their choice was not affected by that change. The Board concludes from that evidence that the objector's representative at the hearing was selected on a basis not related to or affected by this change and the Board draws the same conclusion in respect of the absence of other witnesses at the hearing for the objectors. Moreover, the Board is further satisfied that the objector's choice was not adversely affected by the applicant's reversion at the hearing to its original bargaining unit description.

19. As the Board's decision in *Royal Hydrofoil, supra*, points out, in assessing a petition "... the issue is simple one of *voluntariness*, ..." and the "Gaps in the evidence, ... are relevant to the Board's inquiry in a representation context to the extent that they affect the Board's determination on the fundamental issue of voluntariness ...". It is in that context of the need to determine the voluntariness of a petition that the Board commented further in *Royal Hydrofoil, supra*, after referring to the evidentiary requirements of section 48 of the Board's Rules of Procedure: "These are not technical standards of evidence; they simply reflect the reality that when all of the evidence is in, the Board has to be satisfied that any employee statement being relied upon is voluntary."

20. In the absence of sufficient evidence in the instant case as to how the petition came

into being and in the absence of any evidence whatsoever about the manner in which the signatures on the petition, other than Bird's, were obtained, and having regard for the principles set forth in the Board's decision in *Royal Hydrofoil, supra*, the Board is not satisfied that the statement of desire in opposition to the application expresses the voluntary wishes of those employees who signed it. The Board therefore declines to give any effect to that statement. Furthermore, there is no evidence of other circumstances in this matter which would cause the Board to direct that a representation vote be held. Neither the statement of revocation and reaffirmation nor the applicant's filing and subsequent withdrawal of allegations that the respondent was involved with the petition have relevance in the particular circumstances of this case to the exercise of the Board's discretion under section 7(2).

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22. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER, C. G. BOURNE;**

1. I must dissent with the majority of the Board in their finding even though it conforms to established board practice.

2. However, it seems to me that it is the time the Board reviewed its practice in cases where there has been misunderstanding and confusion on the part of petitioners and where there is no allegation of taint or involvement on the part of the employer. Such is the case here.

3. The petitioners in this instance were sent a copy of the 'Guide'. They did not read this, being unfamiliar with written procedures and inexperienced in formal matters. This is not an uncommon occurrence.

4. In the award of the Divisional Court in *Fuller's Restaurant*, where the circumstances are admittedly different, it was suggested that the Board "might devise and furnish a form of objection to accompany Form 5 in terms that lay people would understand." Certainly the unfamiliarity with procedure which faced the objectors here is almost habitual.

5. The entire position of petitioners is ambiguous, not to say paradoxical. There is no direct reference to a petition in the Act itself; it is merely referred to in section 48 of the Board's Rules, and in Form 5 which is posted in the employer's premises. The Board itself, when asked for direction by objecting employees quite properly maintains its neutrality and confines itself to sending out the Guide. The arm's length involvement, together with the pressures of time, generally frustrates the wishes of the objectors. It is time that the situation was reviewed, either to deny the petition altogether and substitute a vote in all cases, or set out the right in more explicit form.

6. Rule 48(5) reads: "The Board may dispose of the application without considering statement of desire of any employee . . . etc." as set out in the majority award. So long as the present situation continues, this would appear to give the Board discretion to deal with the matter and I believe it should exercise the right to order a vote where there is no taint of any sort and where technicalities or lack of familiarity with the Board's processes are the only hindrances to its acceptability.

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**1221-80-M** Local Union 1256 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Kel-Gor Ltd.**, Respondent.

**Evidence – Section 112a – Whether travel allowance payable – Whether common mistake incorporated in agreement – Whether patent or latent ambiguity – Whether resorting to extrinsic evidence – Admissibility of extrinsic evidence discussed**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**APPEARANCES:** *Harold F. Caley and Gerald Lacasse for the applicant; R. A. Werry and A. Pilat for the respondent.*

**DECISION OF THE BOARD;** February 16, 1981

1. This is the referral to arbitration of a grievance under section 112a of *The Labour Relations Act*.

2. The respondent is a contractor engaged in the construction of a petrochemical refinery for Petrosar in Sarnia. The work in question began in April of 1980 and continues to the present. Under the collective agreement employees are entitled to travel allowance for work performed outside the centre of Sarnia. The city and its immediate boundary area are defined as a “Free Zone” with no travel allowance being payable to employees working on projects within that area. The area immediately outside the Free Zone is called Zone A. With a further area, Zone B, outside of it. Travel allowances are paid to employees working on projects in Zone A and zone B. The issue in this grievance is whether the Petrosar project falls within the Free Zone, so that no travel allowance is payable, or whether it falls within Zone A.

3. The provisions of the collective agreement are as follows:

Schedules – Article 11, EBA-OPC

Agreement, 1978-1980

Local Union 1256 – Sarnia

Transportation and Transfer of Employees

(a) For the purpose of determining the employer’s obligation to supply transportation of employees.

Free Zone is defined as the City of Sarnia and Point Edward and up to two miles south of said City Limits (commonly known as the stop light in Corunna at the 10th Concession of Moore and Highway #40) and two miles east of and north easterly of said City Limits (commonly known as Kimball Side Road.) (As illustrated on map.)

Zone A is a defined area east of the St. Clair river south to a point

known as Highway #80 and then east to a point known as Highway #21 north on Highway #21 to Junction of Highway #7 and 21, thence north to Lake Huron known as side road #15 of Plympton Township. this area does not include the south side of #80 Highway nor the east side of Highway #21 nor east side of Township Road #15 of Plympton. (As illustrated on map.)

Zone B remainder of Lambton County. (As illustrated on map.)

(d) Transportation Zone A, are as follows: Sept. 6, 1978 – \$3.00 per day; May 1, 1979 – \$3.50 per day.

Transportation in Zone B, are as follows: Sept. 6, 1978 – \$4.75 per day; May 1, 1979 – \$5.25 per day.

Except as provided in (a).

. . . [*Map omitted*] . . .

4. It is common ground that the entrance to the Petrosar project lies within two miles of the southern city limits of Sarnia. A straight line drawn two miles south of the city limits would intersect the project. It is also common ground, however, that the project is entirely situated south of the 10th Concession. The company maintains that the collective agreement intends the dividing line between the Free Zone and Zone A to be a line exactly two miles south of the city boundary. On that basis it asserts that the project straddles the line and should be viewed as not subject to the payment of travel allowance. As part of its case the company maintains that there is ambiguity in the collective agreement and that the Board should consider extrinsic evidence to interpret Article 11.

5. The union submits that the intention of Article 11 is that the 10th Concession be the dividing line between the Free Zone and Zone A. It is common ground that the 10th Concession is slightly less than two miles south of the city limits. It maintains that the agreement is not ambiguous, having regard both to the verbal description and the map incorporated in Article 11, and that this is not an appropriate case to have recourse to extrinsic evidence. Alternatively the union argues that since the work in question is in fact performed on a section of the project that is more than two miles south of the city boundary, under the collective agreement travel allowance must be paid for work so performed. Lastly, it submits that if the collective agreement is ambiguous that extrinsic evidence in relation to the history of bargaining between the parties and their past practice support the union's interpretation of the travel allowance provision.

6. Counsel for the company submits that there is an inherent or latent ambiguity in Article 11 of the collective agreement. He therefore requested leave to call parol evidence both to establish the latent ambiguity and to resolve it in a way consistent with the company's interpretation. The Board allowed both parties to call extrinsic evidence going to the question of a latent ambiguity, while reserving on the ultimate question of whether there was either patent or latent ambiguity in the travel allowance provision of the collective agreement.

7. The Board is satisfied that this is not an instance of patent ambiguity. A reading of

the words of Article 11, including the map, causes no puzzlement or equivocation. A reader would conclude that there is a stop light at the intersection of Highway #40 and the 10th Concession and that it lies two miles south of the city limits. the southern city limits and the 10th Concession being parallel, one would also conclude that the 10th Concession traces a line two miles south of the southern city boundary and that it is the line of demarcation between the Free Zone and Zone A. Nothing on the face of the agreement would cause the reader to think twice or have any doubt about the meaning of Article 11 or how it should be applied. In other words, there is no patent ambiguity in the travel allowance provision.

8. Is there a latent ambiguity? In what has become the leading authority on this issue the Court in *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co.* (1968), 30 D.L.R. (3d) 161 (Ont. H. Ct.) commented, at p. 220:

It is to be remembered that a latent ambiguity may be revealed either in the language of the instrument or when an attempt is made to apply it to the facts of a case.

9. When one attempts to apply the words and map in Article 11 to the Petrosar project an obvious contradiction emerges. According to the unchallenged evidence anyone seeking to apply the agreement travelling south on Highway #40 from the city limits discovers that in fact the stop light at the intersection of the 10th Concession, (the stop light at Corunna referred to in the agreement) is only 1-7/8 miles south of the city limits. It then becomes clear that the 10th Concession road also lies 1-7/8 miles from the southern city limits and not at a distance two miles, as the language of the collective agreement would suggest.

10. As the court noted in *Leitch Gold Mines* (*supra* at p. 216, 220) the discovery of an inaccuracy in a contract does not necessarily establish an ambiguity that should be resolved by reference to extrinsic evidence. It is only after extrinsic evidence establishes some equivocation relevant to the dispute that resort should be had to parol evidence of the intention of the parties. In the *Leitch Gold Mines* case it was argued that an inconsistency between the language in a mining rights contract and an inaccurate sketch map that was incorporated in the agreement established a latent ambiguity that should be resolved by resorting to *viva voce* evidence of the intention of the parties. the court concluded that notwithstanding the inaccuracies in the map there was no relevant latent ambiguity, reasoning in part that the intention of the contract was still clear. The court found that even allowing for the flaws in the map the parties were in entire agreement, having clearly intended their rights to be as described on the map. It therefore declined to give any weight or effect to further extrinsic evidence which had been adduced as to the parties' intentions.

11. In the instant case it is clear that there is an error in the language of Article 11. The stop light at Corunna is not two miles south of the city limits. But there is no error as between the language of Article 11 insofar as it refers to the stop light as a specific geographic limit and by extension, the 10th Concession as the southerly limit of the Free Zone. That is what the map shows.

12. Following the principles established in the *Leitch Gold Mines* case the first thing to determine through extrinsic evidence is whether the map in fact reflects a clearly expressed intention of the parties about the boundaries of the Free Zone, subject to a common error in their estimate of the distance from the city limits to the stop light at Cornunna. If that is true,



there is no latent ambiguity made out, but only a common mistake which does not go to the mutual intention of the parties.

13. Evidence respecting the history of Article 11 was given on behalf of the union by G. Douglas Luno who was the business representative of the union from July of 1962 through September of 1973. Mr. Luno adduced in evidence a copy of the collective agreement between the parties for the three year period 1962 through 1965. The travel allowance provision in that agreement was as follows:

When an Employer requires a Carpenter to travel a distance of two miles south of the Sarnia City Limits and Point Edward and two miles east of the Sarnia, City Limits and Point Edward, the Employer shall pay all transportation charges in excess of twenty cents (20¢) per day and travelling time both ways from two miles south of the Sarnia and Point Edward City Limits, and two miles east of the Sarnia and Point Edward City Limits to the job and will be paid at straight time.

It is clear that at that time the boundary beyond which travel allowance became payable was two miles both south and east of the city limits. Mr. Luno described the provision then in effect as a headache. It required a computation of an employee's transportation charges in excess of 20 cents and a further determination of how much time the carpenter spent in travel beyond the two mile limit, such time to be paid at straight time. For example if, on a given day in 1962 a carpenter was working on a site one mile south of the boundary line and took public transportation at a round trip cost of 50 cents, with his total road trip travel time south of the boundary being 20 minutes, he could claim 30 cents plus 20/60 of the then hourly rate of three dollars and ten cents. The formula to calculate his travel allowance would be:

$$\frac{20}{60} \times 3.10 = 1.03 + .30 = 1.33$$

If however the next day or shortly thereafter he moved to a different job site, a common occurrence in the construction industry, his travel allowance would have to be recomputed according to the time and travel charges involved at the new location. If he was driving all or part of the time, or was in a car pool, the daily computation could become still more complicated. Given the number of carpenters that could be employed outside the two mile boundary on a daily basis, and the frequency with which carpenters change job sites it is easy to accept Mr. Luno's evidence that the travel allowance formula in the 1962 collective agreement was a headache to administer.

14. He resolved to change it to a simple formula that could be easily applied and administered. In the negotiations for a new collective agreement in 1965 Mr. Luno proposed the language establishing the three zones that are now part of the agreement including his own sketch of the boundaries, as follows:

#### ARTICLE 12 – TRANSPORTATION AND TRANSFER OF EMPLOYEES

12.01 For the purpose of determining the Employer's obligation to supply transportation of employees:

Free Zone is defined as the City of Sarnia and Point Edward and up to two miles south of said City Limits (commonly known as the stop light in Corunna at the 10th Concession of Moore and Highway 40) and two miles east of and north easterly of said City Limits (commonly known as Kimball Side Road). (As illustrated on map.)

Zone A is a defined area east of the St. Clair river south of to a point known as Highway 80 and then east to a point known as Highway 21 north on Highway 21 to Junction of Highway 7 and 21, thence north to Lake Huron known as side road 15 of Plympton Township. This area does not include the south side of Highway 80 nor the east side of Highway 21 nor east side of Township Road 15 of Plympton. (As illustrated on map.)

Zone B Remainder of Lmabton County. (As illustrated on map.)

12.04 Transportation in Zone “A” are as follows: Zone A – \$2.00 per day.

12.05 Transportation in Zone “B” are as follows: Zone B – \$3.50 per day.

. . . [Map omitted] . . .

15. It is clear, and indeed undisputed, that the intention of the three zone formula and map introduced in 1965 by the agreement of the parties was to establish three easily identifiable zones in two of which travel allowance would be payable on a flat daily rate without regard to transportation charges or travel time incurred by the employee. To do this the parties retained the designation of the distance of two miles but added two more specific descriptive references to pinpoint the boundary line between the Free Zone and Zone A: to the south they added the words “commonly known as the stoplight in Corunna at the 10th Concession of Moore and Highway 40”. To the east they added “commonly known as Kimball Side Road”. To both descriptions they added the qualifications “as illustrated on map”. There is nothing ambiguous about the map. Whether in Mr. Luno’s rough sketch in the 1965 agreement or in the more polished diagram in the current agreement, the southerly and easterly boundaries of the Free Zone are clearly marked as the 10th line and the Kimball Side road.

16. It is a general precept of contract interpretation that insofar as possible words should be taken to have some meaning. A corollary is that when new words are added to words previously found in a collective agreement, the new words can be presumed to qualify or modify the old. That is why when a collective agreement has apparently contradictory language it can be useful to examine the language of previous collective agreements to clarify the intention of the parties, much in the way that the intention of a piece of legislation can be elucidated by examining its evolution.

17. If the interpretation of Article 11 put forward by the company were to prevail the reference in the collective agreement to the 10th Concession and the Kimball side road would be entirely without meaning. In this regard it should be noted that like the 10th Concession,

the Kimball side Road is slightly less than two miles from the city limits. If the parties had intended two miles from the city limits to be the measure of either boundary of the Free Zone they need only have specified two miles, as they had in the 1962 collective agreement. This Board cannot accept that they would have added the more precise designation of the 10th Concession road and the Kimball Side Road both in the language of Article 11 and in their map, a map obviously to be relied on by everyone affected by the collective agreement, if they had intended the boundary to remain unchanged at two miles, wherever the two mile line might fall. In our view a plain reading of the amendment to the article made in 1965 show that as part of their attempt to simplify their travel allowance provision the parties agreed on the 10th line and the Kimball Side Road as the visible boundaries of the Free Zone. They may have believed that those roadways were two miles from the city limits, or they may not have put their minds to it, but there is no evidence that their selection of those two roadways as boundaries was clearly conditioned on that being so. The alternation of their language to include specific landmarks supports the opposite conclusion.

18. For the foregoing reasons, having regard to the extrinsic evidence adduced respecting the negotiating history of the travel allowance provision, the Board finds that the parties had a clear and common intention to make the line plainly designated in their map and reflected in the language of Article 11 the boundaries of the Free Zone. That they incorporated a common mistake in retaining the earlier reference to two miles establishes an error in language and geography that they made jointly. It in no way, however, establishes any ambiguity about their intentions as to the boundaries of the Free Zone. On the basis of the principles expressed in *Leitch gold Mine* case, therefore, having used extrinsic evidence to find that the intention of the parties was unambiguous, the Board should have no further reference to extrinsic evidence of the intention of the parties.

19. Even if it were to rely on the evidence called by both parties as to the way in which the provisions of Article 11 have been administered in the past, that evidence would be of very little assistance. It appears that on jobs falling outside both the 10th line and the Kimball Side Road but inside the two mile limit sometimes the travel allowance has been paid and sometimes it has not. When past practice is apparently as contradictory and inconclusive as the very language that might cause us to look at it, it would, quite apart from its self serving nature, be of little assistance.

20. We should add that even if our conclusion based on the foregoing analysis were not correct, the grievance would succeed on an alternative ground. It is common ground that the work performed lies entirely more than two miles south of the city limits. It appears that the entrance to the project and the brass alley where employees check in and out are north of the two mile line, but that all work is performed south of the line. If it were accepted that the two mile line is the line of demarcation between the Free Zone and Zone A, we must conclude that since all of the employees' work is performed in that area, they must be seen as working in Zone A within the meaning of the collective agreement. We need make no determination of what our conclusion would be if the work performed itself straddled the two mile line.

21. For the foregoing reason, therefore, the Board finds that the grievance must be allowed. The respondent's work on the Petrosan project, being entirely south of the 10th Concession Road, is within Zone A as described in Article 11 of the collective agreement. The Board remains seized of this matter in the event that the parties are unable to agree with respect to the quantum of compensation owing or as to any other aspect of the interpretation or implementation of this award.

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**1704-79-R; 0764-80-U** Service Employees' International Union, Local 183, Applicant, v. **K-Mart Canada Limited (Peterborough)**, Respondent, v. Group of Employees, Objectors.

**Practice and Procedure – Reconsideration – Party seeking to introduce additional evidence on reconsideration – Board clarifying scope of its previous order – Issuing amended notice for posting in view of court consent order to stay part of Board order – Board revoking part of order**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER O. HODGES;** February 16, 1981

1. By letters dated February 1, and February 2, 1981 respectively Mrs. Myrtle Swift and Mrs. Helen Hughes, two of the employees who appeared as objectors to this application have raised a number of objections to the Board's decision herein dated January 26, 1981. While the letters do not expressly request the Board to revoke its certificate or otherwise revise its decision, we are content that on a liberal reading they should be construed as a request for a reconsideration of the Board's decision.

2. Much of the content of the letters takes exception to the findings of fact made by the Board on the basis of the evidence adduced at the hearings. In part the letters also raise factual allegations that were not made at the hearing nor placed in evidence before the Board.

3. The Board's jurisdiction to reconsider its decisions is found in section 95(1) of *The Labour Relations Act*:

95.(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order direction, declaration or ruling.

4. To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the case. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. (See, generally, *International Nickel Company of Canada*, 63 CLLC 16,284; *The Detroit River Construction Limited*, 63 CLLC ¶ 16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York*

*University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board, York University Faculty Association, York University*, 78 CLLC ¶ 14, 132. (Ont. Div. Ct.).

5. In the instant case the objectors called no evidence of their own at the hearing. They did, however, testify at length as witnesses called by the respondent employer. In that way the circumstances of the origination and circulation of their petition were placed before the Board in exhaustive detail. At the conclusion of the hearing, through Mrs. Swift, the objecting employees made lengthy and able submissions respecting the conclusions that the Board should draw from the evidence before it. It is clear, therefore, that the facts touched upon in their letters which formed part of the evidence before the Board are matters which were thoroughly heard, argued and ultimately considered and disposed of by the Board.

6. What of the allegations of fact which were apparently known to the objectors at the time of the hearings but which they did not put before the Board? Without making any comment on the potential impact of the allegations if proved, we must conclude that they cannot be the basis for a reconsideration. It would clearly prejudice the applicant to permit the objectors to relitigate the issue of the union's certification because having received an adverse decision, they now feel that they could have presented a stronger case. Nor can the Board depart from established principle or give undue weight to their protestations merely because the objectors did not retain legal counsel in the presentation of their case. Any party before the Board has the opportunity to be represented by counsel; it would be patently unfair and contrary to well established procedure if a party, having lost its case, could in effect obtain a right to have a second hearing on no other ground than that it had no counsel in the presentation of its case. On both of the foregoing grounds, therefore, to the extent that the objectors' letters can be construed as a request for reconsideration, their request must be denied.

7. In its decision granting certification to the applicant with a supporting remedial order the Board remained seized of the application in the event of any disagreement between the parties respecting the interpretation or implementation of its award. Correspondence from counsel for the union and the employer discloses two areas of disagreement that require clarification by the Board. In a letter dated February 2, 1981 counsel for the respondent indicates that it is unclear about the implementation of sub-paragraph 9 of paragraph 99 of the Board's decision. That portion of the remedial order requires the respondent to:

give union representatives reasonable notice of any visit to the Peterborough store by Mrs. Fox or any other officer or agent of the respondent for the purpose of discussing employee relations with members of the bargaining unit and to allow such union representatives equal and simultaneous access to the employees as is permitted to Mrs. Fox or such other officer or agent of the respondent, such access to be provided for one year, or until such time as a collective agreement is concluded, whichever shall first occur;

8. The respondent takes the position that the above paragraph should not be interpreted so broadly as to prohibit all conversation with employees during visits by company officers in the normal course of business. In his letter the respondent states:

. . . Specifically, Mr. Cumiskey, the Vice-President of Personnel and

Employee Relations, and other officials of the Company, such as, its District Manager, visit the store for the purposes of reviewing the merchandise on hand. Part of that process involves a tour of the floor and discussions with the employees. In the course of those discussions, I am advised that they frequently will discuss with the employees personal matters, such as, their hobbies, the status of any ill family member, and other matters which do not relate specifically to the Union's representation of the employees and do not relate to collective bargaining. . . .

9. Counsel for the union, in a response dated February 4, 1981 takes issue with the employer's position and maintains that the terms "for the purposes of discussing employee relations" should be given the broadest interpretation.

10. To the extent that the union's view would preclude management officers during the course of business such as stock taking from speaking with employees about their hobbies, family matters or any other topic that does not relate to the union or to collective bargaining generally, the Board must disagree. There is nothing express or implied in the Board's order to prohibit or restrict such conversations, so long as they do not involve discussion of the union, collective bargaining or terms and condition of employment, such matters being for discussion with the union exclusively through the bargaining process.

11. A second difference between the parties involves the content of the remedial order and the notice to be posted in light of the recent agreement of the parties and consent order of the Divisional Court to stay the payment of compensation to Kelly O'Connor and Beverly Clark pending judicial review of the Board's decision. In light of the stay of that part of the Board's remedial order an amended interim notice should issue. The respondent is therefore ordered to post forthwith an amended appendix, being in the form of the appendix to this decision, in the places and under the conditions described in sub-paragraph 11 of paragraph 99 of the Board's decision of January 26, 1981, for the period of sixty consecutive working days from the first day of posting.

12. Counsel for the union requests that the portion of the Board's order giving the union access to the employee bulletin boards and a list of the names and addresses of the employees be extended to be effective one year to the date that the Board's notice is first posted. The order giving the union reasonable access to the employee bulletin boards and requiring the respondent to provide the union with updated lists of the names and addresses of the employees are independent remedies that are not conditioned on the posting order. It is not therefore appropriate that they be extended or abridged in relation to the day that the posting is first made.

13. The Board has one further concern. While we heard extensive argument from counsel at the hearing, the parties did not specifically address the nature of remedy that would be appropriate to redress the unfair labour practices directed at Kelly O'Connor and Beverly Clark. Part of the Board's concern in ordering compensation of the two employees with notice to the employees in the bargaining unit was to provide some immediate redress to the individuals involved and to their union with a view to restoring the position of the union in the workplace and facilitate immediate representation and bargaining. The possibility of immediate remedial impact now appears to have been removed by the agreement of the union to the Court's stay of that part of the Board's order and the amendment of its posting.



14. The Board's jurisdiction to award compensation for non-monetary sanctions imposed on employees in violation of the Act in any case is a question of considerable importance, going to the ultimate scope of the Board's remedial authority. It would appear, that unless there is a formal reconsideration of this aspect of the Board's order, that this critical issue would first be argued before the Divisional Court, never having been fully argued before this Board. In our view that would be undesirable, both from the stand point of the Board and of the Court. Being the body primarily charged with the administration of the Act in any case the Board is the forum which should first hear full submissions on the limits of its jurisdiction. By the same token upon judicial review the Court can benefit from a Board decision rendered after full litigation of the issue. Given the interim disposition of the matter on consent in the Divisional Court there would appear to be no prejudice to either party to now permit full argument of an issue which in fact arose only after the Board's decision was rendered.

15. For the foregoing reasons the Board deems it appropriate, in addition to amending the posting order, to revoke that part of its order requiring the payment of compensation to Kelly O'Connor and Beverly Clark pending such further submissions as the parties may wish to address to the Board on that issue.

16. The Registrar is therefore instructed to list this matter for a continuation of hearing, the purpose of which will be to hear the submissions of the parties on the Board's jurisdiction to order the payment of compensation to the two employees concerned and the appropriateness of any other remedial order in respect of the two employees in the circumstances. The Registrar is further instructed to issue forthwith an amended notice in the form of the appendix attached hereto.

#### **DECISION OF BOARD MEMBER J. D. BELL;**

1. I agree that the letters of objection from Mrs. Swift and Mrs. Hughes should be construed as a request for reconsideration of the Board's decision dated January 26, 1981.

2. Other letters of objection from individuals who claim to be employees of K-Mart and to be affected by the above decision have also been received and brought to the attention of the Board.

3. These letters, in my opinion, confirm my findings in my dissent of January 26, 1981, that "this apparent solid front against the union makes the section 7a certification unreasonable in light of the 1980 amendment to *The Labour Relations Act*". I would revoke the certificate issued.

4. I concur with the decision of the majority to revoke that part of its order requiring the payment of compensation to Kelly O'Connor and Beverly Clark. I see no need to hear further submissions on this matter. The Court has already ruled that damages that are punitive are not within the jurisdiction of the Board: *Tandy Electronics Limited supra*.

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# NOTICE TO EMPLOYEES

## Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT ENGAGE IN SURVEILLANCE OR HARASSMENT OF EMPLOYEES FOR THE PURPOSE OF INTERFERING WITH THEIR RIGHTS UNDER THE LABOUR RELATIONS ACT.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON EMPLOYEES, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT EMPLOYEES FROM EXERCISING THEIR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT INTIMIDATE EMPLOYEES FROM FREELY GIVING EVIDENCE IN ANY PROCEEDING UNDER THE LABOUR RELATIONS ACT.

WE WILL NOT DISCHARGE OR THREATEN TO DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

WE WILL PROVIDE THE SERVICE EMPLOYEES INTERNATIONAL UNION FORTHWITH WITH A LIST OF THE NAMES AND ADDRESSES OF EMPLOYEES IN THE BARGAINING UNIT AND KEEP THE LIST UPDATED FROM TIME TO TIME AS ORDERED BY THE BOARD.

WE WILL PROVIDE REPRESENTATIVES OF THE SERVICE EMPLOYEES INTERNATIONAL UNION ACCESS TO THE STORE DURING WORKING HOURS FOR THE PURPOSE OF CONDUCTING THREE SEPARATE MEETINGS OF THE EMPLOYEES IN THE BARGAINING UNIT, IN GROUPS OF 10 TO 15, IN THE LADIES' LOUNGE AND OUT OF THE PRESENCE OF ANY MEMBER OF MANAGEMENT.

WE WILL PROVIDE REPRESENTATIVES OF THE SERVICE EMPLOYEES INTERNATIONAL UNION ACCESS, WITH REASONABLE NOTICE BEFOREHAND, TO ANY MEETING OF EMPLOYEES SPONSORED BY K-MART WHICH INVOLVES THE DISCUSSION OF COLLECTIVE BARGAINING, WITH EQUAL TIME TO BE AFFORDED THE UNION REPRESENTATIVES TO RESPOND.

WE WILL GIVE THE SERVICE EMPLOYEES INTERNATIONAL UNION REASONABLE NOTICE OF ANY VISIT TO THE PETERBOROUGH STORE BY MRS. FOX OR ANY OTHER OFFICER OR AGENT OF K-MART CANADA LIMITED FOR THE PURPOSE OF DISCUSSING EMPLOYEE RELATIONS WITH MEMBERS OF THE BARGAINING UNIT AND WILL ALLOW UNION REPRESENTATIVES EQUAL ACCESS TO THE EMPLOYEES AS IS PERMITTED TO MRS. FOX OR ANY OTHER REPRESENTATIVE OR AGENT OF K-MART.

WE WILL PROVIDE THE UNION, FOR A PERIOD OF ONE YEAR FROM THE DATE OF THE BOARD'S ORDER, REASONABLE ACCESS TO ALL EMPLOYEE NOTICE BOARDS TO POST UNION NOTICES, BULLETINS AND OTHER UNION BUSINESS LITERATURE TO THE ATTENTION OF THE EMPLOYEES.

K-MART OF CANADA LIMITED (PETERBOROUGH)

PER: (AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**

**2175-80-R** Laura F. Cochlin, Applicant, v. United Cement Lime & Gypsum Workers International Union, Respondent, v. **Lesmith Limited**, Intervener.

**Termination – Union failing to make a collective agreement within one year after certification – Whether fact that agreement was signed after filing of termination application relevant**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

**APPEARANCES:** *Laura F. Cochlin for the applicant; E. K. Mattocks for the respondent; Harvey Spiegel, Q.C., for the intervener.*

**DECISION OF THE BOARD;** February 9, 1981

1. This is an application for termination of bargaining rights made under section 49 of *The Labour Relations Act*. The respondent trade union was certified to represent certain of the employees of the intervener employer on October 30, 1979. Subsequently, negotiations commenced and on June 6, 1980 the Minister issued a notice to the parties that he did not consider it advisable to appoint a conciliation Board in this matter. A lawful strike of the employees commenced on August 26, 1980. It appears that the strike eventually collapsed with a substantial number of employees returning to work. The present application for termination of bargaining rights was made on January 13, 1981. At the hearing in this matter the Board was informed that the respondent and the intervene employer had signed a collective agreement dated January 26, 1981. It is clear, however, that at the time the present application was filed with the Board, no collective agreement was in effect between the respondent and the intervener.

2. It would thus appear that the present application is made pursuant to subsection 1 of section 49 which reads as follows:

“If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.”

That subsection is subject to the timeliness provisions of section 53 of the Act and in particular subsection 3 of section 53 which reads as follows:

“Where a trade union has given notice under section 13 and the employees in the bargaining unit on whose behalf the trade union was certified as bargaining agent thereafter engage in a lawful strike or the employer lawfully locks out such employees, no application for certification of a bargaining agent of, or for a declaration that the trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made,

(a) until six months have elapsed after the strike or lock-out commenced; or



- (b) until seven months have elapsed after the Minister has released to the parties the report of the conciliation board or mediator or a notice that the Minister does not consider it advisable to appoint a conciliation board,

whichever occurs first.”

In view of the history of collective bargaining between the parties, it would appear that under clause (a) of section 53(3) the earliest date for a timely application would be February 26, 1981 and under clause (b) of subsection 3, the earliest date for a timely application would be January 6, 1981. It would appear then that with no collective agreement in existence, a timely application for termination for bargaining rights could be made after January 6, 1981. The Board, therefore, finds that the application for termination is timely under section 49(1) and section 53(3) (b).

3. The fact that a collective agreement was made subsequent to the filing of this application, indeed, subsequent to the terminal date of this application is not a relevant consideration. In this regard the decision of the Board in *Canadian Transportation Workers Union No. 197 National Council of Canadian Labour*, [1967] OLRB Rep. May 154 was cited to the Board. That case dealt with an application under the present section 51(1) which gives the Board the discretion upon a termination application to terminate bargaining rights where a trade union that had been certified does not proceed with the collective bargaining process. The present application, however, is made under section 49(1) and the employees are entitled to look at the situation at the time when the application is made. Indeed, the main thrust of section 53 is to protect the collective bargaining process. The protection of the bargaining process afforded by section 53 having run out, the respondent trade union cannot, subsequent to an application, defeat that application by signing a collective agreement with the employer.

4. At the hearing in this matter, the Board heard evidence concerning the origination and preparation and circulation of the document which accompanied the application for termination. We are of the view that it represents the true wishes of the employees and, accordingly, the Board finds that not less than forty-five per cent of the employees of the intervener in the bargaining unit, at the time the application was made had voluntarily signified in writing that they no longer wished to be represented by the respondent on January 22, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 49(1) of the Act.

5. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at Oakville, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. A representation vote will be taken of the employees of the intervener in the bargaining unit. Those employees eligible to vote will be all employees of the intervener on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

7. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Lesmith Limited.
8. The matter is referred to the Registrar.

**0574-80-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Applicant, v. Miore Distributing Co. Limited, Respondent.**

Employee – Truck owner-operators delivering respondent's products on customer routes – Whether dependent contractors – Usual criteria discussed and applied – Board distinguishing Supreme Court of Canada decision in *Yellow Cab Ltd.*

**BEFORE:** Ian C.A. Springate, Vice-Chairman, and Board Members H.J.F. Ade and M.A. Ross.

**APPEARANCES:** *E.G. Posen and R. Hill for the applicant; and B. Pollock and J. Manafo for the respondent.*

**DECISION OF THE BOARD; February 12, 1981**

1. This is an application for certification in which the Board issued a decision on July 7, 1980.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of *The Labour Relations Act*.
3. The parties are in agreement that the respondent employs two individuals who would appropriately be included in the bargaining unit under consideration. However, they are in disagreement as to the status of twelve other individuals. The respondent takes the position that these twelve are independent contractors not covered by *The Labour Relations Act*. The applicant, however, submits that the twelve are "dependent contractors" as that term is defined in section 1(1) (ga) of the Act and accordingly, by force of section 1(1) (gb), they are to be considered employees for the purpose of the Act.
4. The respondent is primarily engaged in the distribution of soft drinks to private residences. The individuals in dispute all use trucks to deliver soft drinks, and certain other products, to customer's homes. For convenience purposes, these individuals will henceforth be referred to simply as "drivers". A labour relations officer has conducted an inquiry into the status of four of the drivers. The parties are in agreement that the Board should treat these four as being representative of all of the drivers.
5. Three of the four drivers examined work five days per week, apparently servicing a different route each day. The other driver, Mr. G. Caserta, at one time also worked five days per week but he returned one of his routes to the respondent when he concluded that the small

number of customers on the route did not warrant the work involved. Accordingly, Mr. Caserta now works only four days per week.

6. The trucks used by the drivers to make their deliveries are parked overnight at the respondent's premises. In the morning, the drivers come in and unload the cases of empty bottles picked up the day before, and then load up with full bottles. A driver's work day is completed when he has finished that day's route. This may require that he work into the evening.

7. While doing their routes, the drivers usually wear a uniform bearing the respondent's name, although they are not required to do so. The cost of the uniforms is shared equally between the respondent and the drivers.

8. Generally, when a driver starts delivering for the respondent, he is put through a training program lasting a number of weeks. During this period, the driver receives a set salary and uses a company-owned vehicle. At the end of his training period, a driver is taken off salary and advised that he is expected to purchase his own truck. Two of the four drivers examined had purchased their trucks from the respondent. Another of the drivers Mr. L. Catinella, has been delivering the respondent's products for some months now but is still using a company owned truck. The respondent has made it clear to Mr. Catinella, however, that he must shortly buy a vehicle of his own either from the respondent or from some other source.

9. With one exception, the driver's trucks are all painted in the respondent's colors and all of them bear the respondent's name. The respondent pays the cost of painting the trucks. Drivers are responsible for the upkeep and maintenance of their own trucks as well as for keeping them insured. The drivers treat the costs associated with insuring and operating their trucks as deductible expenses for income tax purposes. The drivers can, and usually do, purchase both gas and mechanical services from the respondent, although they are not required to do so. If a truck is not operating because of mechanical problems, a driver can generally borrow a spare truck from the respondent. Mr. Caserta, one of the drivers examined, indicated that, on one occasion, there was no spare truck available for him to use, and accordingly he rented a truck with the respondent paying the costs involved.

10. The respondent charges the drivers \$3.25 (exclusive of a deposit on bottles) per case of soft drink and sets what Mr. Manafo, the President of the respondent, referred to as a "suggested retail price" of \$4.50. The drivers collect the \$4.50 retail price from the customers and in turn later pay the respondent \$3.25, keeping \$1.25 for themselves. Although soft drinks are the main product delivered by the drivers, they also deliver other products for the respondent, including vegetable oil and bleach, for which they also receive the difference between the amount paid by the customer and the amount later paid over to the respondent. According to Mr. Manafo, the drivers are free to charge more or less than the price suggested by the respondent and he indicated that this in fact had occurred in the past. There is nothing before us, however, to indicate that any driver currently charges a price other than that set by the respondent. Indeed, the notice to the drivers setting out the current prices nowhere states that they are merely suggested prices. All four drivers examined stated that they charge the price set by the respondent. Three of the four drivers indicated that they felt that they could not charge any other price. The fourth driver, Mr. Del Gobbo, indicated that he felt he could charge customers a lower price, but not a higher one.



11. Mr. Manafo stated that the respondent set a suggested retail price both so as to be able to tell potential customers what the price of the product is, and also for retail sales tax purposes. The price charged by the company to the drivers includes a seven per cent retail sales tax calculated on the basis of the respondent's suggested price to the customer. The respondent forwards this amount to the government. It should be noted that the amount forwarded to the government would only be correct if the drivers charged customers the company's suggested price.

12. Although the respondent discusses price increases with the drivers, the respondent has the final say in determining both the cost to the drivers and the "suggested" price to the customer. Around the beginning of March 1980, the respondent indicated it would be raising both the retail price as well as the amount charged to the drivers. The drivers were concerned that the increase would result in a loss of customers, and on March 3, 1980, they petitioned the respondent asking that the increase to the customers not be so great, and also that the cost to the drivers be lowered. Representatives of the respondent met and discussed the matter with the drivers, but refused to alter the rates already set.

13. The drivers receive no remuneration for delivering the respondent's products other than the difference between what the drivers charge the customers, and what they later pay to the respondent. They receive no holiday pay, vacation pay or fringe benefits of any kind. The drivers at times extend credit on their own initiative to customers and one of them Mr. Calligaris, stated that he has lost some money by doing so.

14. When a driver is off work ill, or takes a vacation, a supervisor with the respondent will perform his route either using the driver's truck or one owned by the respondent. The driver is not paid for the day, even if his truck was used.

15. As noted above, the drivers deliver a variety of products supplied to them by the respondent. Two of the four drivers examined indicated that they also sell soap supplied to them by another company. One of the drivers, Mr. Caserta, stated that he made less than \$50.00 per year selling the soap. The other driver, Mr. Catinella, indicated that some weeks he sold no soap at all and that on other weeks he might sell one or two bags, on which he made \$2.00 per bag. From this information, we can assume that Mr. Catinella makes between \$100.00 and \$200.00 per year from the sale of soap. None of the drivers examined does any other work than that set out above. Thus the drivers receive either 100% or close to 100% of their incomes from the delivery and sale of the respondent's products.

16. The drivers each deliver to customers within an area assigned to them by the respondent. Most new customers are obtained by householders approaching the drivers while they are doing their rounds, although some of the drivers will knock on doors to ask people if they would like to become customers. New customers are also obtained by people phoning the respondent's offices and asking that they receive home delivery. These customers are then assigned to the driver who delivers in that geographic area. To facilitate this process, the delivery trucks bear the respondent's phone number.

17. One of the drivers, Mr. Caserta, has handed out free bottles of soft drink to potential new customers and both he and Mr. Calligaris have given free soft drinks to existing customers with complaints about the product. In all of these cases, however, the respondent has reimbursed the two men. Another of the drivers, Mr. Del Gobbo, has also handed out

bottles of soft drink to customers with complaints. It appears that in all but one instance Mr. Del Gobbo has borne the cost of the soft drink himself. The one exception was when the amount involved reached either \$4.00 or \$5.00 and, because it was so high, Mr. Del Gobbo arranged for the respondent to reimburse him.

18. One of the drivers examined stated that some two or three years ago the respondent had provided him with business cards to hand out. Mr. Del Gobbo indicated he currently hands out similar cards which he had made up at his own expense.

19. Three of the four drivers examined have made use of a helper. In no case was the respondent asked if the men could use a helper, and in every case the driver paid the helper directly. Mr. Catinella uses a helper on Saturdays and pays him \$30.00 for the day. Mr. Calligaris sometime uses a 13 or 14 year old helper on Saturdays who he pays between \$15.00 and \$25.00 for the day, depending on how busy he is. Mr. Caserta's 11 year old son acts as his helper at times, for which he is paid a couple of dollars. On one occasion, Mr. Caserta was not feeling well and his nephew helped him do his rounds, for which the nephew received \$25.00 worth of free ginger ale. Mr. Del Gobbo, the fourth driver examined, has not made use of a helper.

20. None of the drivers examined has been formally disciplined by the respondent, although one of them, Mr. Del Gobbo, indicated that one of the respondent's supervisors had spoken to him on a number of occasions with respect to his having missed some customers on his route. Mr. G. Tortorice, the respondent's supervisor, stated that when customers have complaints about the drivers, he goes out to talk to the customer and might later advise the driver involved to do better.

21. For each driver, there is a series of route books, apparently one for each of his delivery days. The drivers are expected to provide the respondent with the names of any new customers so that the books can be kept up to date. The route books are kept with the respondent. A route book is given to a driver on the day he delivers to customers listed in that particular route book, but is returned to the respondent the following morning. The route books are considered to be the property of the respondent.

22. Section 1(1) (ga) of the Act defines a "dependent contractor" as follows:

"dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

23. The nature of the Board's task in determining whether a person is a dependent contractor or not has been set out as follows in the *Superior Sand, Gravel & Supplies Ltd.* case [1978] OLRB Rep. Feb. 119:

"19. In cases such as this one the Board must distinguish the workman

from the true entrepreneur. The task is not an easy one since there exists no clear line of demarcation. Determining who falls within the Act as a dependent contractor is essentially a factual exercise. The legal test, found in section 1(1) (ga) of the Act provides the Board with only a point of reference but, as the Board has already noted in *Adbo Contracting Ltd., supra*, it is a more useful and less confusing reference point than those adopted by the Board prior to the enactment of the dependent contractor provisions. This new point of reference leads the Board directly to the substance of the economic relationship, and away from those matters of form which merely obscure its reality. While it may be quite true that the Board might reach the very same result by recourse to the old points of reference, this new test provides a more direct and understandable route to the ultimate result.

24. Our task is to make the determination by reference to the criteria set out in the statutory definition of dependent contractor. This definition directs the Board to examine the types of economic dependence and the kind of business relationship, or obligation, that it has before it, and further directs the Board not to give undue emphasis to whether there exists a formal contract of employment and whether or not a person furnishes his own tools, vehicles, equipment or machinery. In the final balance, the Board must be satisfied that the relationship before it, even though it may not bear all the hallmarks of the typical employment relationship, more closely resembles the relationship of an employee than that of an independent contractor.”

24. The relationship between the drivers and the respondent does not bear all the hallmarks of a typical employment relationship. However, after considering all of the evidence, and in particular the fact that the drivers perform a service for the respondent by delivering its product to customers listed in the respondent’s route books, and that the income they receive from delivering the respondent’s product constitutes either all, or almost all, of their income, we are satisfied that on balance the drivers more closely resemble employees than independent contractors. For a similar conclusion involving milk delivery drivers, see *Dominion Dairies Limited* [1978] OLRB Dec. 1083.

25. In reaching this conclusion, we have considered but put little weight on the fact that some of the drivers make use of a helper. The occasional use of a helper in the circumstances present here falls far short of making the drivers entrepreneurs who derive substantial profits or benefits from the labour of others such as might lead to a conclusion that they more clearly resemble independent contractors than employees. See *Dominion Dairies Limited*, op cit, and *Comfort Guard Services* [1978] OLRB Rep. Oct. 905.

26. At the hearing, counsel for the respondent laid great stress on the recent decision of the Supreme Court of Canada in *Yellow Cab Ltd. v. Board of Industrial Relations* 80 CLLC ¶14,066 (S.C.C.). That case arose out of a determination by the Alberta Board of Industrial Relations that an employee-employer relationship existed between certain taxi drivers and a taxi company. The Board reached this determination notwithstanding the fact that the drivers did not receive wages from the taxi company but instead received money from passengers, a portion of which they paid to the taxi company for use of the company’s cars and access to certain of the company’s facilities.



27. Mr. Justice Richie, in giving the decision of the Court, looked to the definition of “employee” in *The Alberta Labour Act* which states as follows:

“1(d) ‘employee’ means a person employed by an employer to do work or provide services of any nature who is in receipt of or entitled to wages; . . .”

His Lordship then examined the facts involved and held as follows:

“As I take the view that no wages flow from the employer-owner to the lessee driver, I cannot find that the relationship of employer and employee existed here within the meaning of the statute.”

28. In our view, the decision of the Supreme Court in the *Yellow Cab* case is not applicable to the instant proceedings. The decision of the Supreme Court clearly flowed from the definition of “employee” contained in the Alberta statute. Further, in the *Yellow Cab* case, the issue was whether or not there existed an employer-employee relationship. In the instant case, the issue is a different one, namely whether the drivers are in a position *more closely resembling* the relationship of an employee than that of an independent contractor. Notwithstanding the fact that the drivers do not receive payments directly from the respondent, but instead turn over to the respondent most of what they collect from their customers, we are satisfied that the relationship involved more closely resembles the relationship of an employee than that of an independent contractor and that accordingly, the drivers are “dependent contractors” for the purposes of *The Labour Relations Act*.

29. At the hearing, counsel for both the applicant and the respondent were in agreement that if the Board were to determine that the drivers were dependent contractors, then they should be included in the same bargaining unit as the two “regular employees”. The applicant has as members a majority of the dependent contractors, and none of the dependent contractors have come forward to indicate that the applicant does not represent their views with respect to the composition of the bargaining unit. In these circumstances, we are satisfied for the purposes of section 6(4) of the Act, that a majority of dependent contractors desire to be included in a bargaining unit with the other two employees.

30. The Board accordingly finds that all employees of the respondent, including dependent contractors, employed in the Municipality of Metropolitan Toronto, save and except foremen and supervisors, persons above the rank of foreman and supervisor, and office staff, constitute a unit of employees appropriate for collective bargaining.

31. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on June 23, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

32. A certificate will issue to the applicant.

**0688-79-R Niagara Falls Co-operative Taxi Owners Association,  
Applicant, v. Niagara Veteran Taxi, Respondent.**

**Employee – Whether taxi owner-operators dependent contractors – Whether method of compensation making them employees – Board distinguishing Supreme Court of Canada decision in *Yellow Cab Ltd.***

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members J. A. Ronson and D. B. Archer.

**DECISION OF THE BOARD;** February 10, 1981

1. This is an application for certification.
2. By a decision in this matter dated September 18, 1979 (*Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889) the Board found that the applicant Association had taken the procedural steps necessary to establish its status as a trade union. A final determination of trade union status pursuant to section 1(1)(n) of *The Labour Relations Act*, however, was not made by the Board in that decision. The Board had to be further satisfied that the organization was an organization of employees as stipulated in the definition of “union” in section 1(1)(n) of the Act. The applicant organization maintained that the persons in question, taxi owner-operators, were dependent contractors within the meaning of section 1(1)(ga) of the Act and, therefore, employees for the purposes of the Act while the respondent argued that they were independent contractors.
3. In a brief decision dated August 20, 1980 the Board held that the owner-operators in question were dependent contractors.
4. In view of the membership strength of the applicant the Board then certified the applicant Association as the exclusive bargaining agent for the owner-operators in the bargaining unit.
5. The Board’s reasons for finding that the owner-operators are dependent contractors are set out below.
6. The parties agreed that the following persons were not employees for the purposes of the Act: M. Chapman, T. Chapman, F. Fontaine, M. Hunter, P. Pasco and R. Walsh. The parties also agreed that the evidence of Louis Andrews, Peter Barnhart, Jim Cowan and Scott Gregg would be representative of the duties and responsibilities of themselves and all other owner-operators in the bargaining unit applied for. Counsel for the respondent acknowledged that if the Board were to determine that the representative persons were employees under the Act, it would follow that trade union status should attach to the applicant organization.
7. In a parallel proceeding the applicant filed a complaint under section 79 of the Act alleging that the respondent, Niagara Veteran Taxi (hereinafter referred to as “N.V.T.”), had discharged Mr. William Manson, a taxi cab owner-operator, for his efforts in organizing other owner-operators involved in this application for certification. As a preliminary matter to that complaint the parties asked the Board to determine whether Manson was a dependent contractor within the meaning of section 1(1)(ga) of the Act. In *Niagara Veteran Taxi*, [1980]

OLRB Rep. Mar. 337, the Board held that Manson was a dependent contractor. The evidence of the four persons examined for the purposes of this application for certification differs only slightly from the evidence the Board heard regarding the duties and responsibilities of Mr. Manson.

8. “Dependent contractor” and “employee” are defined by the Act as follows:

1.-(1) In this Act,

(ga) “dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

(gb) “employee” includes a dependent contractor;

To decide whether the four owner-operators examined are dependent contractors the Board must look to whether they perform work or services for N.V.T. for compensation or reward, whether they are in a position of economic dependence and whether they are under an obligation to perform duties for N.V.T. so that they are in a relationship with N.V.T. more closely resembling that of an employee than an independent contractor.

9. It is evident that the owner-operators perform services for N.V.T. They service N.V.T. charge account runs and other calls for taxi transportation which are radio dispatched to them by N.V.T. The further question, however, is whether they perform these services for compensation or reward within the meaning of section 1(1) (ga) of the Act. With charge account runs the owner-operators receive payment directly from N.V.T. N.V.T. in turn receives its payment from the customer carrying the charge account. (For a similar arrangement in a different context see the Board’s decision in *Abdo Contracting Company Ltd.*, [1977] OLRB Rep. April 197) Apart from the charge account runs, the owner-operators are compensated directly by the passenger rather than N.V.T.

10. Since the Board’s decision in this matter dated August 20, 1980 to which the Board now supplies its reasons, the Supreme Court of Canada has issued a decision relating to the employee status of taxi cab drivers. The decision, *Yellow Cab Ltd. v. Board of Industrial Relations and Alberta Union of Provincial Employees*, 80 CLLC ¶14,066, (S.C.C.), considered the effect of this form of indirect compensation (that is, compensation flowing to the taxi driver from the passenger rather than from the taxi company) on the existence of an employer/employee relationship between the taxi company and driver. The Supreme Court of Canada overturned both the decision of the Alberta Board of Industrial Relations and the confirming decision of the Alberta Court of Appeal on the ground that the Board had erred in law by adopting common law principles defining “employee” which were at variance with the language of *The Alberta Labour Act*, 1973, S.A. c. 33. The Supreme Court concluded that the taxi drivers in question were not employees of the Yellow Cab Ltd. because they did not receive wages directly from the company.



11. The existence of an employer/employee relationship between the taxi company and drivers was a precondition to The Alberta Board of Industrial Relations dealing with the taxi drivers' unfair labour practice complaint. To determine whether such a relationship exist the Court focused on the definitions of "employer" and "employee" as well as the general scheme of the Act. *The Alberta Labour Act*, unlike *The Labour Relations Act* of Ontario defines both "employer" and "employee". "Employer" is defined in section 1(e) (iv) to mean, among other things,

. . . a person, corporation, partnership, or group of persons who . . . is responsible for the payment of wages to an employee.

"Employee" is defined in section 1(d) of *The Alberta Labour Act* as follows:

"employee" means a person employed by an employer to do work or provide services of any nature who is in receipt of or entitled to wages...

In evaluating *The Alberta Labour Act* as a whole, the Supreme Court commented that, as revealed in section 35 of that Act, the scheme of the Act is based on wages flowing directly from an employer to an employee. At p. 12,328 the Court said,

In my opinion the scheme of the Act, which is repeatedly indicated in various sections referred to by the appellant, is predicated on the "wages" therein referred to being wages which flow directly from an employer to an employee. This is made manifest for example by s. 35 of the Act which provides:

35. (1) A period of employment for computation of wages earned shall not be longer than one calendar month or such other period as the Board may fix.

(2) Each employer shall pay to each employee within 10 day after the expiration of each period of employment established which the employee has been employed all wages earned by the employee within that period.

(3) Where the employment of an employee is terminated by the employer, all wages earned by the employee shall be paid to him by his employer upon the termination of the employment.

12. Focusing on these three factors, the scheme of *The Alberta Labour Act*, the definition of "employer" which includes the responsibility for paying wages to an employee and the definition of "employee" which stipulates the receipt of or entitlement to wages, the Supreme Court concluded that under *The Alberta Labour Act* wages had to be paid directly from the employer to the employee for an employer/employee relationship to exist. At p. 12,328 the Court said,

In my view this definition is also exhaustive and it confines the meaning of "employee" for the purpose of the statute to persons who are "in receipt of or entitled to wages". It appears to me that an employer and employee relationship can only exist where the employee is "in receipt of

or entitled to wages”, the payment of which is the responsibility of the employer.

...

It is pointed out on behalf of the respondents that there is no express provision in the statute requiring that wages and other remuneration within the meaning of this section must come directly from the employer but, as I have indicated, I adopt the view that when the Act is read as a whole this must have been the intention of the Legislature.

13. In the case before the Supreme Court of Canada the taxi drivers were paid by passengers. In these circumstances the Court concluded that because no wages flowed from the employer to the drivers, the relationship of employer/employee did not exist within the meaning of the statute.

14. The decision in *Yellow Cab Ltd.* is closely tied to the particular wording of *The Alberta Labour Act*. The relevant provisions of *The Labour Relations Act* of Ontario are fundamentally different.

15. “Employer” is not defined in *The Labour Relations Act* of Ontario. Unlike *The Alberta Labour Act* the Ontario Act does not suggest that a necessary element of being an employer within the meaning of the Act is the payment of wages directly from the employer to the employee. As well, again in contrast to *The Alberta Labour Act*, the Ontario Act does not state or suggest that to be an employee within the meaning of the Act, a person must be in receipt of wages directly from the employer.

16. A further critical distinction between *The Alberta Labour Act* and *The Labour Relations Act* of Ontario is that the Ontario Act, unlike Alberta’s gives separate and distinct recognition to a hybrid person falling somewhere between the traditional employee and entrepreneur or independent contractor. When the Ontario Legislature amended the Act in 1975, (*The Labour Relations Amendment Act*, 1975, S.O. 1975, c. 37, s.1(1) it added a definition of “dependent contractor”, section 1(1)(ga), and in its only definition of “employee” provided that a dependent contractor was an employee for the purposes of the Act, section 1(1)(gb).

17. In one of the early decisions following the amendments the Board commented on the unique characteristics of the dependent contractor and, for the purpose of identification, the importance of focusing on the nature of the business relationship rather than a contract of employment as would exist with the traditional employee. In *Abdo Contracting Company Ltd.*, [1977] OLRB Rep. April 197 the Board said at pp. 202-203,

The question that must now be answered by the Board is, not whether a person falling within the shaded area on the economic spectrum is an employee or an independent contractor, but whether that person is a dependent contractor. This new point of departure does not mean that considerations formerly taken into account are now totally irrelevant. The statutory definition of dependent contractor clearly requires some reference to the employee-independent contractor distinction. A shift of

emphasis has occurred, however, as this new definition recognizes that persons in an economic position closely analogous to that of the employee should also enjoy the benefits of collective bargaining. The determination of who is a dependent contractor is now a comparative exercise that requires reference to a much broader range of labour relations considerations.

This redefinition of the limits of *The Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship. These two considerations provide the justification for the shift of emphasis.

The shift of emphasis is readily apparent from a reading of the definition of dependent contractor. Clearly a person need not be employed under a contract of employment to be considered as a dependent contractor, and provision of tools, vehicles, equipment, machinery is no longer a major consideration. Contractual form and the ownership of tools are no longer essential considerations. The emphasis, instead, is placed upon economic and business factors. Both the type of economic dependence that exists, and the kind of business relationship entered into, determine whether a person more closely resembles an employee than an independent contractor.

Economic dependence must be such that it puts the person in roughly the same economic position as an employee who must face the perils of the labour market. . . .

This first requirement of a particular type of economic dependence is closely related to the second requirement of a particular kind of business relationship. In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be "under an obligation to perform duties for that person" *roughly* analogous to that of an employee. This reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee. Such an examination, however, need not result in the identification of a particular contractual obligation, since a business relationship may exist, and continue, in the absence of any particular contractual obligation. The Board, therefore, need not confine itself to this very narrow issue but may deal with the wider issue of the nature of the business relationship.

[emphasis added]

18. Taxi owner-operators are often a triangular relationship with the company they



work for and the passengers they service. That the major source of their income happens to be paid to them directly by passengers rather than a taxi company does not itself alter the essential nature of the business relationship between the owner-operator and the taxi company.

19. Another kind of triangular relationship was fully analyzed by the Board in *A. Cupido Haulage Limited* [1980] OLRB Rep. May 679 where truck owner-operators were in a triangular relationship with a broker, A. Cupido Haulage Limited, and the quarry owners, Canada Crushed Stone. In this situation the owner-operators' compensation was paid by the broker. Notwithstanding the fact that they received their compensation from the broker, the Board held that the owner operators were economically dependent on Canada Crushed Stone.

20. The purpose of the dependent contractor amendments to the Act was, generally, to enable persons engage in collective bargaining who, despite numerous earmarks of independent contractors, are in essence dependent for their livelihood on the person or company for whom they perform services for compensation or reward. It would thwart the intention of the Legislature if such persons were denied dependent contractor status just because they receive their compensation directly from the client serviced rather than their employer. This is especially true when neither the scheme of the Act nor the definition of "dependent contractor" stipulates that compensation or reward must come directly from the employer.

21. Given the critical distinctions between *The Alberta Labour Act* and *The Labour Relations Act* of Ontario, the Board concludes that the Supreme Court of Canada's decision in *Yellow Cab Ltd.* does not preclude this Board from finding that the scheme of compensation and reward provided for the owner-operators in this case falls within the definition of "dependent contractor" in section 1(1) (ga) of the Act.

22. For the reasons set out above the Board concludes that the compensation received by the owner-operators both from N.V.T. for charge account runs and from the passengers for other runs is "compensation or reward" within the meaning of section 1(1) (ga) of the Act.

23. We turn to the next consideration of economic dependence. To what extent are the owner-operators economically dependent on N.V.T. They each pay dues of \$51.50 a week to Mr. William Peters who owns N.V.T. In return for these dues the owner-operators are entitled, within the rules established by N.V.T., to participate in the dispatch service provided by Mr. Peters. For the payment of dues the owner-operators are further provided with stationery, driver sheets, business cards and charge account books. The owner-operators at N.V.T. benefit substantially from the established relationship N.V.T. has with numerous business in Niagara Falls. In addition to the charge account runs, N.V.T. has direct telephone line from such places as the chain grocery stores, Zellers, the General Hospital and the Medical Arts Professional Building. With the direct telephone line a customer can pick up the phone and be linked directly to N.V.T. Such calls are then dispatched to the owner-operators. Additionally N.V.T. has numerous taxi stands which are designated for Niagara Veteran taxis only.

24. When owner-operators are cut off from the dispatch service either for disciplinary reasons or because they have driven their full shift, they are still entitled to drive the streets looking for passengers. Notwithstanding this ability to attract some business through their own initiatives, the evidence of the four owner-operators who testified as to their duties and

responsibilities satisfies the Board that they are economically dependent on N.V.T. Mr. Scott Gregg stated that ninety-five per cent of his work is dependent on the N.V.T. dispatch service. He said that it would be financial suicide to operate without the N.V.T. dispatch service.

25. Niagara Falls, Ontario attracts a substantial number of tourists in the summer months. Gregg generally drives in one of the zones which is not populated with tourists. His dependence on the dispatch service, therefore, does not fluctuate with the tourist season. Other owner-operators who testified, however, drive in what is known as "the centre" which is heavily populated with tourists in the summer months. For these owner-operators the evidence establishes that in the summer months they could probably make a living on their own picking up tourists in need of taxi services. Mr. Dixon A. Barnhart, for example, testified that from June through Labour Day, he could, with concerted effort, make a living without the dispatch service. He testified, however, that during the non-tourist season he wouldn't have a chance without the dispatch service. He emphasized the economic importance to him during that time of the regular charge account runs set up by N.V.T., Louis Andrews, another owner-operator, testified that in the tourist season fifty per cent of his business comes from the tourists and fifty per cent is local, presumably coming to him through the dispatch service. As with Mr. Barnhart, he too emphasized the substantial amount of his work that comes from the charge accounts established by N.V.T.

26. Even if it were possible for an owner-operator working the tourist section of Niagara Falls to make a living during the summer months without the use of the dispatch service, the evidence readily establishes that this would not be possible on a year-round basis. Furthermore, it is only the limited number of owner-operators who regularly work the tourist district who would be able to survive in the summer months without the use of the dispatch service. There are many other owner-operators who do not benefit significantly from the summer tourist bonanza.

27. The Board concludes on the evidence before it that the owner-operators are economically dependent on Niagara Veteran Taxi for their livelihood. Although some owner-operators may do some minimal advertising on their own behalf, the evidence shows that initiatives of this sort do not significantly augment an owner-operator's income. While some owner-operators who regularly work the tourist area of Niagara Falls are less dependent on Niagara Veteran Taxi during the summer months than others, the Board is fully satisfied that even they on a year-round basis are economically dependent on the dispatch service for their livelihood. The fact that owner-operators are willing to pay \$51.50 on a weekly basis in both the summer and the winter for the dispatch and other services and the fact that they originally purchased their relationship with N.V.T. with a payment of approximately \$500.00 underscores the Board's conclusion that the owner-operators are dependent on N.V.T. for their economic well-being.

28. Are the owner-operators under an obligation to perform duties for N.V.T. in a way more closely resembling the relationship of an employee than an independent contractor? For this determination the amount of control exerted by N.V.T. over the work of the owner-operators becomes particularly relevant.

29. There are certain aspects of the owner-operators' relationship with N.V.T. that resemble the situation typical of an independent contractor. N.V.T. does not make contributions on behalf of owner-operators for any health, life or accident insurance plans.

Owner-operators are financially responsible for their own car insurance, license plates and repairs. N.V.T. makes no deductions for income tax, unemployment insurance benefits, Canada pension plan or workmen's compensation coverage. The owner-operators purchase their own radio meters, and roof signs. Furthermore if an owner-operator is sick it is not necessary for him to notify N.V.T. that he will not be working that day. Owner-operators can take vacations when they want and if they return from a vacation later than originally anticipated, it is not necessary to notify N.V.T. of the delay.

30. Notwithstanding these earmarks of an independent contractor, the evidence establishes that William Peters, the owner of Niagara Veteran Taxi, exerts such a high level of control over the owner-operators that they in fact more closely resemble employees than independent contractors. Owner-operators are subject to a sophisticated network of rules by which they must abide in their day to day work for N.V.T. Although many of these rules were established through consultation with the applicant Association and owner-operators, the evidence establishes that it was Mr. William Peters who ultimately decided upon the rules and who determines which ones shall be enforced. If owner-operators want to work the day shift during the school year they have to check in by 8:15 a.m. or they will be cut off from dispatching services until 2:00 p.m. Further if they work the day shift, they are not permitted to have access to the dispatch service after 9:00 p.m. While owner-operators can generally decide what shift they want to work, the evidence reveals that they cannot switch back and forth between shifts during any one week. They cannot, for example, work the day shift from Monday to Friday and then on Saturday work the night shift. Many of the rules established by Mr. Peters reflect the by-laws of the Niagara Regional Board of Commissioners of Police. Some, however, are personal to N.V.T. The public by-laws, for example, state that taxi drivers should be dressed neatly. Mr. Peters, however, has imposed additional requirements prohibiting owner-operators from wearing shorts and sandals in the summer months. One of the owner-operators, Mr. Barnhart, testified that the owner-operators were further prohibited from wearing dungaree, beards of hair below their collars. There are other rules prohibiting owner-operators from stealing jobs, refusing to take a call for which they have been dispatched, checking in too early or being discourteous to a customer. The rules are enforced by N.V.T. through the use of penalties ranging from fines to suspension (being cut off from dispatch services) to discharge. Each of the owner-operators testifying in this proceeding stated that he had been subject to such discipline.

31. The nature of the control Mr. Peters exerts over the owner-operators is reflected in two notices he posted, one on May 1, 1979 and the other on July 3, 1979:

NIAGARA VETERAN TAXI CO.  
CORNER BRIDGE & SECOND  
NIAGARA FALLS, ONTARIO  
May 1, 1979

NOTICE: *ALL OWNERS AND DRIVERS*

THE PRACTICE OF CHECKING OUT ON JOBS THAT MAY  
NOT BE TO YOUR LIKING MUST STOP AT ONCE.

ALSO, CERTAIN DRIVERS HAVE AN ARRANGEMENT WITH  
BELLHOPS AND A PAYOLLA EXISTS FOR OUT OF TOWN



TRIPS; OUR SWITCHBOARD WILL NOT CATER TO THESE DRIVERS FOR PERSONAL CALLS.

THIS NOTICE IS A FAIR WARNING TO ALL; YOU WILL BE DISMISSED IF THIS PRACTICE CONTINUES — DRIVERS AND OWNERS.

“William Peters”

July 3, 1979

#### TO WHOM IT MAY CONCERN

Contrary to many rumors, this business is not selling out or the management quitting. However it is not going to operate with a divided company and a[n] association that thinks it is going to play the tune. For everyone's information the Niagara Veteran's Taxi has acquired all available taxi licences (nine in all) and for those that may be interested a few are available with arrangements made by William Peters. To clear the air once and for all all owners wishing to separate may do so and our co-operation will be given in matters of insurance etc. As of *July 15* you are requested to drop your name in the gasoline chute indicating your desire to stay or separate. Those who have not indicated by that date will be considered no longer associated with the company.

“William Peters”

Warnings of this nature reflect a permanent and continuing relationship controlled by a party closely resembling the typical employer in an employer/employee relationship.

32. Further evidence of the control exerted by Mr. Peters was given by Mr. Gregg. Mr. Gregg testified that he advertised his taxi-cabs for sale on the bulletin board in 1979 but that before anyone could buy it they had to have Mr. Peters' approval. He stated that in July 1979 two dispatchers wanted to buy his car but Mr. Peters prevented the sale because he needed dispatchers.

33. In addition to control, the use of drivers by owner-operators is also an important factor in evaluating the total character of the relationship to determine whether it more closely resembles the relationship of an employee than an independent contractor. (See, for example, the Board's decisions in *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806, *Comfort Guard Services Ltd.*, [1978] OLRB Rep. Oct. 905 and *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083). In this case Mr. Andrews uses a driver for three months of the year.

34. In *Canada Crushed Stone* the Board stated that dependent contractor-employers are not dependent contractors within the meaning of section 1(1)(ga) of the Act. In paragraph 23 of its decision the Board made the following comment:

Having decided that the line should be drawn to exclude dependent contractor-employers from the meaning of “dependent contractor” as defined in section 1(1)(ga) of the Act, the Board must emphasize that its

decision in this regard is intended to exclude only dependent contractors who are employers in substance as well as form. It is this type of dependent contractor who more closely resembles an independent contractor than an employee. A dependent contractor with the authority to hire, fire, discipline, and set the terms and conditions of employment in respect of others is not a dependent contractor entitled to the benefits and protections of *The Labour Relations Act*. If, however, it is found that a dependent contractor does not possess this type of authority, then, notwithstanding the fact that he may be the nominal employer of others, he may still be entitled to bargain collectively under *The Labour Relations Act*.

In this case the Board excluded from the definition of “dependent contractor” one person who owned and operated a company which had ten trucks and employed seven persons to operate the equipment. The owner hired his own employees, set their terms and conditions of employment and assigned work. In the same case the Board further excluded two other persons it determined were employers in form as well as substance. They too had authority to hire, fire, discipline and set terms and conditions of employment.

35. In *Comfort Guard Services Ltd.*, *supra*, and *Dominion Dairies Limited*, *supra*, the Board gave further consideration to the status of persons who in the performance of their own work used the labour of others. In *Comfort Guard Services* the Board stated that the occasional use of a single helper to lighten the load of the person alleged to be a dependent contractor could not be fairly described as an entrepreneurial endeavour which would create a situation more closely resembling an independent contractor than an employee.

36. Similarly in *Dominion Dairies Limited* the Board drew a distinction between persons hired to lighten the load of the alleged dependent contractor and persons hired to increase their output. In that case, all of the contract drivers who delivered the respondent's dairy products employed the use of helpers on their routes. The Board stated at pp. 1091 and 1092,

The line between contractors whose activities are more closely analogous to those of a wage earner, so as to make them dependent contractors, and contractors who are sufficiently entrepreneurial as to be excluded from that definition is not easy to draw. It can only be drawn in the light of the facts of each particular case. In *Canada Crushed Stone* the Board found that a contractor who owned 10 trucks which were driven by seven employees in an aggregate material hauling business that grossed \$250,000 per year was not, by virtue of the entrepreneurial nature of his business, a dependent contractor within the meaning of the Act.

In a more recent decision, *Comfort Guard Services Ltd.* (Board File No. 2007-77-R, as yet unreported, Oct. 6, 1978) the Board found that a heating equipment service contractor was not deprived of status as a dependent contractor merely because he sometimes made use of a helper on his service calls. In that case the Board determined that the use of a helper merely to lighten the serviceman's load was to be distinguished from the use of an employee hired on a regular basis to drive a second

vehicle and make separate service calls, thereby substantially increasing the contractor's capacity for profit.

When the Board is faced with the question of the effect of the use of paid help by a contractor it must determine whether, in the light of all of the evidence, the person or persons used merely assist the contractor in the performance of his work or in fact perform work that is separate and beyond the work done by the contractor, so that the contractor may fairly be characterized as master of a business that profits in a substantial way from the labour of others.

In this case the Board is satisfied that the contractor-drivers who make use of a single helper, whether occasionally or regularly, do not cease to be dependent contractors by virtue of that fact. The use of a young helper to lighten the load during the summer season, to shorten the hours worked on a Saturday or to eliminate the burden of stairs on a daily basis does not thrust the contractor-driver into an entrepreneurial undertaking that can be meaningfully described as deriving profit in any substantial way from the work of others. The contractor-drivers examined used helpers when they were employed as milkmen and represented for collective bargaining purposes by the applicant prior to 1970. At that time the Board had recognized that the use of a helper did not of itself deprive an individual on his status as an employee under the Act. (*Automatic Fuels Limited*, [1966] OLRB Rep. Apr. 22).

37. In this case each of the owner-operators examined owned as of the date of the application for certification only one taxi. Further as of the date of application none had a driver who would regularly operate his taxi after the owner-operator had completed his own shift. The Board, therefore, is not called upon in this case to determine what impact if any such an arrangement would have on the status of a person who in all other respect appears to be a dependent contractor.

38. The testimony reveals, however, that on an annual basis Louis Andrews takes a three-month vacation during which period he has a driver operate his taxi. Typically when an owner-operator uses a driver the driver gives back to the owner-operator a percentage of what he earns. Mr. Andrews testified that he does not care how much his driver works during his absence as long as he makes enough money to pay his weekly dues of \$51.50 which must be paid by an owner-operator even when he is on vacation. Mr. Andrews testified that when he gets back from vacation he doesn't even check the daily sheets to certify whether he is actually being given the proper per cent of the driver's earnings. He emphasized that he doesn't care how much or little his driver works while he is away as long as he covers his dues.

39. The totality of the evidence reveals that an owner-operator cannot be forced to use any particular driver. Mr. Peters, however, may veto an owner-operator's choice of driver. Mr. Barnhart, for example, testified that at one point he was unable to put the driver he wanted on his car because he had been suspended and needed Mr. Peters' approval to drive again. On another occasion Mr. Peters would not allow Mr. Barnhart's son to drive the taxi until he shaved his beard.

40. On the totality of the evidence the Board concludes that while a driver is operating



an owner-operator's taxi his employment is more closely controlled by Mr. Peters than by the owner-operator. This situation is readily distinguishable from the situation in *Canada Crushed Stone, supra*, where the person contending he was a dependent contractor not only owned his own company and employed ten drivers but also exercised the authority to hire, fire, discipline and set the terms and conditions of employment of the drivers. An owner-operator like Mr. Andrews who uses a driver while he is on vacation does not exercise particular control over his day to day activities.

41. The Board is satisfied that Andrew's use of a driver while he is on vacation cannot fairly be described as an entrepreneurial undertaking that would cause the Board to conclude that he more closely resembles an independent contractor than an employee. Not only does Mr. Peters exert substantial control over the driver, but also Mr. Andrews' use of the driver is designed to prevent Mr. Andrews from losing money while he is away through his continuing obligation to pay weekly dues. In this respect Mr. Andrews situation is similar to that of the helper in *Dominion Dairies* and readily distinguishable from the circumstances in *Canada Crushed Stone*.

42. Evidence contained in the Labour Relations Officer's report relating to the use of drivers by any other owner-operators suggest, at most, only an occasional use that would not approach an entrepreneurial relationship that would cause the Board to exclude them from the definition of "dependent contractor" in section 1(1)(ga) of the Act.

43. On the totality of the evidence, the Board is further satisfied that the owner-operators associated with N.V.T. are economically dependent on it and under an obligation to perform duties for it in a manner that more closely resembles the relationship of employees than independent contractors.

44. For the reasons set out above the Board finds that the owner-operators are dependent contractors within the meaning of section 1(1)(ga) of the Act and, therefore, having regard to the provisions of section 1(1)(gb), employees for the purposes of the Act.

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**1137-80-R** Labourers' International Union of North America –  
Local 183, Applicant, v. **Pelar Construction Ltd.**, Respondent.

**Bargaining Unit – Construction Industry – Whether Board continuing historical distinction between Labourers' locals 183 and 506 on sectoral basis after amendments to Act – Effect of section 131a discussed – Whether either local may apply for province-wide ICI unit**

**BEFORE:** R. A. Furness, Vice-Chairman, D. E. Franks, Vice-Chairman, R. O. MacDowell, Vice-Chairman, and Board Members H. J. F. Ade and N. A. Wilson.

**APPEARANCES:** *A. M. Minsky and John Stefanini for the applicant; No one appearing for the respondent; Gary Walker and Alan Franklin for The Ontario Form Work Association and The Ontario Drain Contractors Association; S. Gilbert Cragg, Peter Hitchen, Stephen Grant and Raj Anand for Labourers' International Union of North America, Local 506; G. Grossman for The Metropolitan Toronto Road Builders Association, The Heavy Construction Association of Toronto, The Metropolitan Toronto Sewer and Watermain Association, The General Contractors Section of the Toronto Construction Association and The Utility Contractors Association of Ontario.*

**DECISION OF THE BOARD;** February 2, 1981

1. This is one of a series of cases involving the certification of Local 183 or Local 506 of the Labourers' International Union of North America. A series of such cases involving these two unions was set for hearing at the same time and heard by a five-man panel of this Board. At issue is the interpretation to be given to section 131a of *The Labour Relations Act* in light of the Board's longstanding policy of distinguishing between the bargaining units granted to these two local unions of the same international in the Toronto area, known as Board Geographic Area #8.
2. The Labourers' International Union of North America has two locals, Local 506 and Local 183 which have as their geographical jurisdiction areas relating to Metropolitan Toronto Area and its vicinity. In its decision in *Cross Town Paving*, [1965] OLRB Rep. May 128, the Board adopted a policy distinguishing between the appropriate bargaining unit of construction labourers for each of these two locals in the Toronto area. The distinction was a simple one, Local 506 was given a unit of construction labourers engaged in building construction and Local 183 was given a unit of construction labourers engaged in construction other than building construction.
3. This distinction lasted until 1974 when the Board issued its decision in *Peniche Construction Forming* [1974] OLRB Rep. April 208. That decision continued the policy of *Cross Town Paving* in that it distinguished between the types of appropriate units for each of the two locals. The rationale for continuing this distinction was set out in paragraph 9 and 10 at pages 212-213.

“... It is our concern, that to remove completely the distinction between the appropriate bargaining unit granted to these two locals would have an unsettling effect on what are presently established and important patterns of bargaining in the construction industry in the Toronto area. This distinction was reflected in the bargaining units which resulted from

the *Cross Town Paving* case, and although that distinction can no longer stand, *in toto*, we are of the view that to completely remove the distinction between the two types of bargaining units would lead to undesirable consequences. The effect of this type of distinction is to designate at the time representation rights are determined, which bargaining pattern is the appropriate bargaining pattern for the particular case at hand. The failure by the Board to recognize the appropriate bargaining pattern when determining the appropriate bargaining unit adds an additional element to the collective bargaining activity. This bargaining in turn is reflected in a modification of the Board's finding of the appropriate bargaining unit. But, surely, the Board should complete all the findings with respect to the unit of employees appropriate for collective bargaining when it makes the determination required of it under section 6 of the Act.

We are also concerned that the failure to continue to distinguish between these two locals of the same union would lead to future jurisdictional disputes. There are examples of two locals of the same craft union having concurrent geographical jurisdiction, and the Board has not found it necessary to make such a distinction. The present situation is distinguishable in that the trade jurisdiction claimed by both locals and their parent international union ranges over all types of construction. The scope of jurisdiction claimed by each of the locals affects all types of unionized construction and creates a complex jurisdictional boundary which if ignored at the time when the bargaining unit is being determined would expose a substantial part of the construction industry to jurisdictional disputes of an extraordinary kind, i.e., two locals of one union rather than two different trades, competing for the same work assignment."

4. As a consequence, the Board set out for Area 8 the following scheme of appropriate bargaining units:

*"Units for Local 183*

(i) All construction labourers employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.

(ii) All construction labourers, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.

*Unit for Local 506*

All construction labourers employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman."



The Board has continued this policy of distinguishing between the two local unions until the coming into force of Statutes of Ontario, 1979 Chapter 113 (Bill 204) and Statutes of Ontario, 1980 Chapter 31 (Bill 73), both of which became effective May 1, 1980.

5. *The Labour Relations Amendment Act, 1980 (No. 1)* S.O. 1980, c. 31 introduced the present section 131*a* which reads in part as follows:

“(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

(2) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(3) Notwithstanding subsection 1 of section 108, a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.”

9. The position taken by the two local trade unions before this Board is as follows:

Local 183 – takes the position that the Board should follow literally the directive contained in section 131*a* and where an application is made by either local under subsection 1, the Board should find the appropriate bargaining unit as set out in 131*a*(1) and issue the two certificates as directed in subsection 2 of section 131*a*. On the other hand, should either

local apply for certification for sectors other than the industrial, commercial and institutional sector under subsection 3, either local should obtain a certificate for sectors other than the industrial, commercial and institutional sector.

Local 506 – takes the position that Local 506 and only Local 506 should be entitled to apply for a certificate under subsection 1 and Local 183 should be restricted to applying for a certificate under subsection 3 of section 131*a*. Thus, in effect continuing the kind of distinction between the two locals set out in *Cross Town Paving* and *Peniche Construction Forming*.

10. In making its decision in the *Peniche* case, the Board had before it extensive evidence as to the organizational activity of both Local 183 and Local 506. Further, although the *Peniche* case does not refer to sectors of the construction industry, it is clear that the distinctions made in *Peniche* are not unrelated to the notion of sector as it appears in section 106 of *The Labour Relations Act*. In the present series of cases, the Board had filed with it a number of jurisdictional arrangements between the two locals. It is clear, however, that in recent years these jurisdictional arrangements have been in a state of flux. Indeed, although there was no agreement as to the facts in the area of the extent of organization by each local in various sectors, for the present purposes, it is only necessary to comment that there are not the clear patterns of organization that existed at the time of the *Peniche* decision. Certainly, there is no indication that the relationship between these two locals will be any more stable now than it has been in the past. Thus, it is clear that Local 183 represents constructions labourers in the industrial, commercial and institutional sector as well as sectors other than the industrial, commercial and institutional sector. On the other hand, Local 506 represents employees in both the industrial, commercial and institutional sector and as well as sectors other than the industrial, commercial and institutional sector. On the facts, then, it is clear that no simple clear-cut distinction between the two locals such as was made in the *Peniche* case can be made at this time.

11. Apart from the problems of attempting to make out a *Peniche* type distinction between the two locals of constructions labourers in the Toronto area, there remains the very real question as to whether the Board has the statutory power to make such a distinction, given the language of section 131*a*. Of particular importance is the phrase “... the unit of employees *shall* include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area...” (emphasis added). This is clearly a mandatory direction to this Board by the Legislature as to the appropriate bargaining unit in an application under section 131*a*(1). Similarly, subsection 2 also issues mandatory directive to the Board as follows: “... and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.” (emphasis added). It would seem, therefore, that where an application is made under subsection 1, the Board has no jurisdiction under a clear reading of the legislation to institute the *Peniche* type of distinction between the two locals with respect to the appropriate bargaining unit.

12. The position of Local 506 in this regard is that Local 183 should as a matter of Board policy not be allowed to bring an application under subsection 1, that is, the distinction between the two locals should be reflected by limiting Local 183's access to applications under

subsection 3 and that Local 506 and only Local 506 should be entitled to bring an application under subsection 1. Again, it is difficult to see that section 131a(1) gives the Board the discretion to make such a policy: “an application for certification . . . *shall* be brought by either (a) an employee bargaining agency; or (b) one or more affiliated bargaining agents of the employee bargaining agency, *on behalf of* all affiliated bargaining agents of the employee bargaining agency.” (emphasis added.) It is not denied that both Local 506 and Local 183 are affiliated agents within the meaning of *The Labour Relations Act*. Clearly, the section gives such affiliated bargaining agents access to an application under subsection 1 and in fact mandates the agency relationship of the applicant to the other affiliated bargaining agents. That is, regardless of which local of the Labourers’ International Union brings the application by subsection 1, that application is brought on behalf of all of the affiliated bargaining agents of the Labourers’ employee bargaining agency. Thus, whether Local 183 brings the application or whether Local 506 brings the application, it does so on its own behalf and on behalf of the other local.

13. Local 506 urged the Board to interpret section 131a in such a matter as to continue the *Peniche* type of distinction between the two locals. Its argument is that traditionally Local 506 has been the industrial, commercial and institutional local of the Labourers’ International Union of the Toronto area, and that the Board should seek in its interpretation of 131a to maintain this traditional distinction. Thus, it argues that where Local 183 applies for certification, the Board should look at the sector in which the employees are working and if there are no employees in the industrial, commercial and institutional sector the Board should decline to entertain an application under subsection 1 and instead require that the application be dealt with under subsection 3 of section 131a. To do this would require the Board to make sector determinations in certification proceedings. In raising this argument, counsel for Local 506 suggests that the reasoning in *Lyle West*, [1978] OLRBP Rep. Nov. 999, no longer applies. The basis of counsel’s argument in this regard is the opening words of section 131a, “An application as bargaining agent *which relates to* the industrial, commercial and institutional sector . . .” (emphasis added). Counsel argues that to give meaning to the words “which relates to” means that of necessity the Board must look to the sector in which the employees are working and if there are no employees working in the industrial, commercial and institutional sector, then the application ought to be dealt with under subsection 3 rather than subsection 1.

14. Since the introduction of section 131a, in its present form, the Board has refused to adopt this interpretation of subsection 1 and subsection 3 of section 131a. The Board has interpreted the relationship between these two subsections as basically an option exercised by an applicant for certification; that is, the applicant trade union can decide whether it is applying under subsection 1 or subsection 3. Thus, an application relates to the industrial, commercial and institutional sector of the construction industry if the applicant for certification says that it relates to that sector. See, *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729.

15. The basis for the Board’s interpretation of section 131a(1) in this manner is the substantial legislative history of this relatively new provision. As noted above, section 131a first appeared in Statutes of Ontario, 1979 Chapter 113, that provision read in part:

“An application for certification as bargaining agent *for the employees*



*of an employer employed in the industrial, commercial and institutional sector of the constructions industry . . .” (emphasis added)*

That language clearly requires the Board to determine that employees are working in the industrial, commercial and institutional sector of the construction industry as a condition precedent to the application of section 131a(1). However, that language never came into force as a section of *The Labour Relations Act*. As noted above, the Legislature retrospectively amended section 131a to its present form. In fact, the change in 131a not only removed the necessity to determine the sector in which employees are working as a condition precedent for the application for subsection 1, but it mandates an appropriate bargaining unit which in itself avoids the requirement to make determinations concerning the sector in which an employee is working. The unit of employees “. . . shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area. . .”. Thus, although “provincial agreement” is defined in clause *e* of section 125(1) (which introduces the notion of employees in the industrial, commercial and institutional sector) for the appropriate geographic area, the unit includes all other employees. Thus, for the local area in which the application is made, (in the present case we are concerned only with Board Area 8) the unit of employees *must* include all employees in all sectors. Thus, in determining the list of employees it is not necessary, in the local geographic area, to have regard to the sector in which such employees are working.

16. It is thus clear that the second version of section 131a involved a major shift in emphasis from the original version of section 131a. In view of the two major changes in the language of subsection 1, we are of the view that the legislative history of that section evinces a clear legislative intent to avoid making determinations concerning sectors in the context of certification proceedings. Such determinations are more properly made under section 135 of the Act.

17. In addition to the reasons based on the legislative history of section 131a given above, we are also of the view that there are good labour relations reasons for avoiding such sectoral determinations in the context of certification proceedings. In this regard, we are of the view that the concern expressed of the Board in the *Lyle West* case about the delay caused by such determinations is still a very real concern. In this regard, our concern over the delay caused by sectoral determinations is similar to our concern for the delay caused by jurisdictional determinations. With respect to jurisdictional determinations, the Board has on numerous occasions said that that is something more properly dealt with under section 81 of the Act than in the context of a certification proceeding.

18. In sum, we find that we cannot accept the interpretation given to section 131a by counsel for Local 506. We are not prepared to interpret section 131a in such a way that we will engage in inquiries as to the sector in which employees are working before an application can be brought under subsection 1. In any event, as noted above the facts do not support this particular argument by Local 506 since there is no clear distinction between the two locals on a sectoral basis. In view of the foregoing reasons, therefore, we are of the view that both Local 506 and Local 183 are entitled at their option to apply under either subsection 1 or subsection 3 of section 131a. In such applications, the Board will follow the mandatory directives of the relevant subsections.

19. In this regard, we should like to emphasize the approach the Board has taken to the

certificates granted by virtue of subsection 2. Where an application has been made under subsection 1 and the appropriate unit of employees is found to include employees in the industrial, commercial and institutional sector throughout the province and employees in sectors other than the industrial, commercial and institutional sector in a local geographic area, the Act directs the Board to issue two certificates. Subsection 1 indicates that such an application is "on behalf of all affiliated bargaining agents in the employee bargaining agency". Thus, the Board issues one certificate to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents in the employee bargaining agency with respect to employees in the industrial, commercial and institutional sector in the Province of Ontario. The second certificate is issued to the applicant for sectors other than the industrial, commercial and institutional sector in the appropriate geographic area. Thus, in the present circumstances regardless of which local either 183 or 506 which applies under subsection 1, the applicant is certified on its own behalf and on behalf of the other affiliated bargaining agents in the employee bargaining agency for the industrial, commercial and institutional sector. That is to say, Local 506 is certified on behalf of Local 183 amongst others, and Local 183 is certified on behalf of Local 506 amongst others in relation to the industrial, commercial and institutional sector of the construction industry.

20. If the application is made under section 131a(1) with respect to sectors other than the industrial, commercial and institutional sector, then the applicant will be certified in Board Geographic Area #8 for all sectors other than the industrial, commercial and institutional sector. A number of these sectors have been traditionally within the jurisdiction of Local 183. However, at the hearing in this matter counsel for Local 183 recognized that this was the consequence of the position taken by Local 183 and, did not urge the Board to take any other position with respect to these other sectors. In our view it is clear that in the near future both Locals are going to have to make some accommodation with each other in order to deal with this situation.

21. We should like to make one further comment at this point considering the overall effect of the position taken by the Board in this case. The overall effect of the Board's decision to issue either Local province-wide bargaining rights in the industrial, commercial and institutional sector as agent for the various bargaining agents puts the onus on the employee bargaining agency and the affiliated bargaining agents to clearly set out in the provincial agreement the relationship between the various parts of the employee bargaining agency. This is something that is done in most provincial agreements, and we see no reason why it cannot be done in the provincial agreement relating to labourers.

22. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 127(1) of the Act on April 21, 1978 and amended July 13, and September 6, 1978, the designated employee bargaining agency is The Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council.

23. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act* and is an application made pursuant to section 131a(1) of the Act.

24. The Board further finds that pursuant to section 131a(1) of the Act that all

construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

25. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 30, 1980, the terminal date fixed for this application and the date which the Board determines, to be the time for the purpose of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

26. Section 131a(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

“ . . . , the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.”

(emphasis added)

Therefore, pursuant to section 131a(2) of the Act a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 24 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

27. Further, pursuant to section 131a(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

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**2250-80-R** International Union of Bricklayers and Allied Craftsmen,  
Applicant, v. **Pietrangelo Masonry**, Respondent.

**Construction Industry – Membership Evidence – Whether Board accepting membership evidence where Form 54 Declaration Concerning Membership Documents not filed**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**DECISION OF THE BOARD;** February 24, 1981

1. This is an application for certification within the meaning of section 108 of *The Labour Relations Act*.
  2. The applicant has filed certain membership documents with the Board, but has not filed a duly completed Form 54, Declaration Concerning Membership Documents, Construction Industry.
  3. In certification proceedings such as this, the Board must rely on documentary membership evidence not revealed to the employer or subject to cross-examination. Because of this fact, the Board requires, by way of a Form 54 declaration, assurances from a responsible union official concerning the authenticity of the membership documents. Lacking a Form 54 declaration, the Board has historically refused to give any weight to the membership evidence that has been filed. See: *Stradwicks Ltd.*, [1967] OLRB Rep. Feb. 920.
  4. In that the applicant failed to file a duly completed Form 54, we are of the view that it has not filed any acceptable evidence of membership. the application is accordingly dismissed.
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**1381-80-R** United Brotherhood of Carpenters and Joiners of America, Local 785, Applicant, v. **Roy Brandon Construction** Brandon General Contractors Limited and/or Roy Brandon Limited, Respondents.

**Related Employer – Sale of a Business – Owner of bankrupt business resuming business through new company – Whether section 55 applies where only transfer involved was of owner – Whether related activity must be carried on at same time – Whether inactivity and bankruptcy of company terminated union’s bargaining rights – Board exercising discretion to limit application of relief to employer’s contracts entered into after notice of applicant’s claim recieved**

**BEFORE:** M. G. Mitchnick Vice-Chairman and Board Members H.J.F. Ade and C.A. Ballentine.

**APPEARANCES:** *J. James Nyman, Stephen Koshler and Ernest Arsenault for the applicant; Joseph Kelly for the respondents.*

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER H. J. F. ADE; February 23, 1981**

1. This is an application requesting the Board to find that the respondent Roy Brandon Limited is bound by the provincial Carpenters’ collective agreement, either by virtue of a “sale of a business” within the meaning of section 55 of *The Labour Relations Act*, or by virtue of the “related employer” provisions of the Act.

2. The facts which form the background to this application are not in dispute. The principal behind Roy Brandon Limited, Roy Brandon himself, until 1973 carried on business in the construction industry through a corporation with the name of Brandon General Contractors Limited. Roy Brandon and his wife were at all times the only shareholders, officers and directors of that company. The business of the company, from its beginnings in the 1950’s, was primarily that of house-building. In the early 1970’s, as the Brandons’ son Brian grew up and was able to take on more of the burdens of the business, the company moved into the industrial, commercial and institutional sector as well. Most of the estimating was then done by Brian, although virtually all of the business contacts continued to exist through Roy Brandon himself. It is admitted that Brandon General Contractors Limited was at that time bound to a collective agreement with Carpenters Local 1940 covering all carpenters’ work in the industrial, commercial and institutional sector within the counties of Waterloo, Wellington, Brant, Norfolk and Dufferin (including the complete city limits of Orangeville).

3. By 1973, the company owned equipment and one or two trucks, plus substantial real property, including the building in which the company’s office was housed. Through a series of misadventures involving a job at Conestoga College, however, Brandon General Contractors Limited, late in 1973, found itself unable to pay its debts. In October 1973 the company made an assignment in bankruptcy, as a result of which it literally lost everything. Roy Brandon arranged with the trustee in bankruptcy to complete some of the work in progress, solely for the benefit of the creditors.

4. Following the assignment, Mr. Brandon picked himself up and started over. He registered a trade name of “Roy Brandon Construction” and began doing small house renovations. He continued to use many of the same suppliers as before, although, as one

might expect, he was required to pay cash. Brian by this time had gone out of his own. In 1974, Roy Brandon incorporated the third respondent, Roy Brandon Limited, to carry on his business. Once again the only shareholders, officers and directors were and continue to be Roy Brandon and his wife. The couple's home served as the company's office as well. In May of 1974 the Board accredited the Kitchener-Waterloo Construction Association as exclusive bargaining agent for those employers in a collective bargaining relationship with certain Carpenters Locals, including 1940, in the industrial, commercial and institutional sector of the counties of Waterloo, Wellington, Dufferin, Grey, Brant and Norfolk. Brandon General Contractors Limited was named as an employer bound by that accreditation order. The bargaining rights of Local 1940 were subsequently transferred to the applicant, Local 785, by way of merger, and the Board in previous decisions has recognized that merger. Local 785 became subject to the province-wide designations when Bill 22 was passed amending *The Labour Relations Act* in 1977, and hence claims that the respondent is now covered by the provincial carpenters' agreement.

5. As noted, Mr. Brandon continued without any hiatus to be active in the construction industry, although very little of his work until the present time was in the industrial, commercial and institutional sector. The employment complement of Roy Brandon Limited has always been very small, and never included any former employees of Brandon General Contractors Limited. In 1975 Roy Brandon Limited, in addition to its activities in residential work in the Kitchener area, built a number of houses in the Arctic on behalf of the federal government. The same was true in 1976 and 1977. In 1978, however, the company had no work in the Arctic, and the housing market in and around Kitchener began to decline. Accordingly, the company began to do some commercial work as well, only a small percentage of which was carpentry work. In 1979 all of the company's work was in the Arctic. In 1980 the company was once again forced to turn to the industrial, commercial and institutional sector in order to provide a living for the Brandons, and was the successful bidder on a number of contracts in the counties surrounding Kitchener. In May of 1979 Brandon General Contractors Limited was, incidentally, discharged as a bankrupt by the Court, but has carried on no business since that time.

6. In September of 1980 the applicant for the first time discovered, through the commercial reporting services, that Roy Brandon was again working in the industrial, commercial and institutional sector in the Kitchener area, and attended at once at one of the respondent's job sites. The respondent Roy Brandon Limited took the position that it was not bound by any collective agreement, and the present proceedings were launched.

7. The applicant takes the position, firstly, that a sale of a business took place when the principal of Brandon General Contractors Limited, Roy Brandon, decided to continue in business through Roy Brandon Construction and then Roy Brandon Limited. The applicant concedes that no tangible assets whatever were transferred from the bankrupt Brandon General Contractors Limited, but argues that Roy Brandon himself was the business, and that the business therefore followed him as he moved from company to company. Apart from whether any "goodwill" can be said to survive the bankruptcy of a business, it is debatable whether what occurred here can be brought within the actual language of section 55. Where the only element moving from one business to another is the principal himself, it appears to the Board, as in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, more appropriate to analyze the situation from the point of view of section 1(4) of the Act.



8. Section 1(4) provides:

“Where, in the opinion of the Board, associated or related activities or business are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.”

In comparing sections 55 and 1(4) of the Act, the Board in *Brant Erecting* stated:

“13. . . . business may be effectively transferred from one corporate entity to another, without any of the indicia of a ‘transfer of a business’ which might trigger the application of section 55. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union’s bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section 55 into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. . . .”

As the above passage indicates, because of the ease with which one business vehicle can be discontinued and another one started, the section now makes it clear that whatever else “associated or related business” means, the words can apply to businesses which may not even be carried on at the same point in time. The Board in *Brant Erecting* noted:

“13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase ‘whether or not simultaneously’. The amendment reflects a legislative recognition that *the essential unity and identity of an economic activity* (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously;...”

(emphasis added)

9. The two businesses, in other words, although unrelated in time, may be so identical in their essential makeup as to be considered “associated or related” within the purpose and meaning of section 1(4) (although there may be a point at which the hiatus is so significant that it would be inappropriate to say that the section applies). As the Board also noted in *Brant Erecting*, the presence of bad faith, or the intention to avoid bargaining rights, is not a pre-requisite to the section applying. The absence of bad faith is, rather, something which the Board may take into account in deciding the extent to which it finds it appropriate to exercise its discretion, having regard to the labour relations purposes of the section.

10. In the *Brant Erecting* case the predecessor company was dissolved without any formal act of bankruptcy. The Board in the present case, therefore, must decide whether the intercession of an assignment in bankruptcy has any effect on the application of section 1(4). Since section 1(4) does not turn on any flow-through or transfer of assets or goodwill, or even on continuity of operation, the answer appears to be that it does not. Were it otherwise, the principals of a company by declaring bankruptcy (with whatever loss to creditors) would find themselves in a better position vis-a-vis the union than if they had not. The language of the section does not appear to contemplate or support such a distinction. In a bankruptcy, of course, certain rights are extinguished by the Court’s final order of discharge. It is doubtful, though, whether even the final order of discharge, any more than the winding-up or dissolution of a corporation (with its limited liability), would prevent the operation of section 1(4). The present case, however, need not decide that. Here Roy Brandon Construction and Roy Brandon Limited in fact commenced to carrying on business before the final order of discharge for Brandon General Contractors Limited was made. The Board, having regard to the “essential unity and identity” of their economic organizations, together with their common direction and control, is prepared to treat Roy Brandon Limited, Roy Brandon Construction, and Brandon General Contractors Limited as one employer for the purposes of the Act.

11. Is Roy Brandon Limited therefore bound by the current provincial agreement, as the applicant alleges? Counsel for the company states that he himself received no notice of the accreditation proceedings which took place in 1973 and 1974, and that, in any event, section 49(1) of *The Bankruptcy Act*, R.S.C. 1970, chapter B-3, as amended, required leave of the Court in order to bind Brandon General Contractors Limited to the accreditation order of the Board. That section states:

“Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property . . . until the trustee has been discharged or until the proposal has been refused unless with leave of the court and on such terms as the court may impose.”

In response to this argument, the Board notes that, by virtue of section 102 of *The Labour Relations Act*, notice sent by the Board is deemed to have been received unless the contrary is proven (see *Valentine Enterprises Contracting*, 80 CLLC ¶14,042 (Ont. Div'l Ct.). In addition, it is highly doubtful that the section of *The Bankruptcy Act* relied upon, with its reference to "creditor" and "claim", has any application to an order of accreditation. But the Board need not rely on these grounds in forming its conclusions. It is admitted that the applicant (through its predecessor) had a collective agreement, and thus bargaining rights, with Brandon General Contractors Limited for the industrial, commercial and institutional sector in the five counties as of 1973. By operation of section 1(4), the Board deems those bargaining rights to have applied to Roy Brandon Limited when it commenced operation in 1974. Unless abandoned by the union, those bargaining rights would continue to exist at the time of the "province-wide" amendments to *The Labour Relations Act* in 1977, and thereafter. Where a company has not over a period of time performed work which would be the subject of existing bargaining rights, the Board has declined to find that the union has "slept on its rights" in failing to press those rights (see *John Miller & Sons Ltd.*, [1979] OLRB Rep. June 540; *Hugh Murray Limited*, [1979] OLRB Rep. July 664), and the Board must decline to do so in the present case as well. The respondent was essentially inactive in the industrial, commercial and institutional sector, except to a limited extent in 1978, from 1973 to 1980, and it cannot be said that the union acted with unreasonable laxity in only discovering in September of 1980 the company's re-entry into the field. It follows therefore not only that the present application is timely, but that Local 785's bargaining rights remained in existence when the 1977 amendments to *The Labour Relations Act* funnelled all such bargaining rights into a single province-wide collective agreement.

12. It is evident to the Board that Mr. Brandon at no time took the action he did for the purpose of escaping the union's bargaining rights. Had it been otherwise, the Board considers it probable that Mr. Brandon would have come up with a somewhat less identifiable name for his new company than "Roy Brandon Limited". The effect of the position taken by the respondent, however, is to undermine the rights validly acquired by the applicant with respect to the work which Mr. Brandon carried on for himself through the predecessor corporation in the industrial, commercial and institutional sector of the construction industry. It is clearly the intent of section 1(4) of the Act that such rights not be discarded lightly by the Board.

13. The Board has a further discretion, however, in fashioning the relief it considers appropriate. Normally, a party in assessing its legal position must be taken to be acting at its own peril. The present case raises considerations of a special character, however, which cannot be ignored. While the bankruptcy of Mr. Brandon's original business and the subsequent passage of time are not such as to cause the Board, in this case, to exercise its discretion by refusing to grant the declaration sought, the Board does not consider this to be an appropriate case to fix the respondents with the consequences of that declaration on construction contracts to which the respondents had already become committed prior to receiving effective notice of the applicant's claim. As there was no written grievance filed in this matter, the Board finds the application itself to be the first effective notice given to the respondents of the applicant's claim. The application was mailed to the respondents by the Board on October 8, 1980, and by virtue of section 102(1) of *The Labour Relations Act* is presumed to have been received in the ordinary course of the mail. The Board in this case takes October 15, 1980, as the date by which effective notice was received by the respondents. As in *English & Mould Ltd.*, [1979] OLRB Rep. Feb. 83, the Board exercises its discretion to limit



its remedy to a form of prospective relief only, in this case affecting contracts entered into after the date notice of the claim was received. Clearly it must be an unusual case where the Board will consider it appropriate to limit the normal operation of its declaration in this manner (see *Norfolk Hospital Association*, 77 CLLC ¶ 14,094), but this is such a case.

14. Accordingly, the Board exercises its discretion to declare Brandon General Contractors Limited, Roy Brandon Construction and Roy Brandon Limited to be one employer for the purposes of *The Labour Relations Act*, but the relief granted is to operate only with respect to construction contracts entered into after October 15, 1980. The collective agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America will therefore be binding only on construction contracts entered into by Roy Brandon Limited or Roy Brandon Construction in the industrial, commercial and institutional sector in the Province of Ontario subsequent to October 15, 1980. The Board so declares.

#### **DECISION OF BOARD MEMBERS, C. A. BALLENTINE;**

1. I agree with the majority's decision declaring that the respondents are one employer under section 1(4) of the Act, and I am sympathetic with the view of my colleagues expressed in paragraph 12 of their decision that "Mr. Brandon at no time took the action he did for the purpose of escaping the union's bargaining rights".

2. Although this may be an unusual case, I am greatly concerned that the decision of this Board to have a declaration under section 1(4) operate prospectively is, when combined with the *English & Mould Ltd.* case, [1979] OLRB Rep. Feb. 83, detrimental to all parties in the organized construction industry. For the following reasons, I must dissent from the majority decision in that regard.

3. The discretion found in the legislation relating to section 1(4) is directed solely at circumstances where a "single employer" declaration is appropriate. It does not relate to the effect of the declaration on the remedies available to the applicant in grievance-arbitration proceedings once the Board has determined that it will issue the declaration. Hence, the Board should not purport to delay the operation of such a declaration. The section 1(4) declaration is properly effective as of the date the employer commenced operating the related business. (See *Norfolk Hospital Association*, 77 CLLC ¶ 14,094.) Indeed, the Divisional Court in that case at page 205 noted the natural consequences of such a declaration and the curious result if the declaration operated in the way in which the majority has decided:

...no curial process can be other than retroactive when it finally disposes of the matter in issue. What possible use the determination of the Ontario Labour Relations Board in this case would be had it meant its decision to apply only to future circumstances entirely escapes us.

4. It is my opinion that the *English & Mould Ltd.* case is bad law and should not be used by this Board as a precedent to be followed. For the Board to issue a declaration under

section 1(4) and then suspend its effect while the projects being carried on by the non-union arm of the employer are completed merely invites the continued practice of employers attempting to get away with as many jobs as possible, before the relationship between the companies is discovered by the union and made subject to section 1(4) of the Act.

5. The applicant union in this case simply applied for a declaration under section 55 and in the alternative under section 1(4). The applicant did not ask the Board for any other relief which is open to it under a section 112a grievance-arbitration application *if* and when it chooses to exercise that right.

6. It is my decision that the unanimous declaration that the respondents are one employer for the purpose of the Act is operative in the way which the Divisional Court described in *Norfolk Hospital Association*.

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**1746-80-R** Association of Allied Health Professionals: Ontario, Applicant, v. **Toronto East General and Orthopaedic Hospital, Inc.**, Respondent, v. Ontario Public Service Employees Union, Intervener #1, v. Service Employees International Union, Local 204, Intervener #2, v. Group of Employees, Objectors.

**Bargaining Unit – Certification – Applicant seeking displacement of incumbent union representing technical employees – Requesting enlargement of unit to include unorganized professional employees – Whether established bargaining history precludes enlargement without regard to wishes of professional employees**

**BEFORE:** Pamela C. Picher, Vice-Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

**APPEARANCES:** Catherine Bowman, Lynda Mason and Lydia Lizinski for the applicant; C. G. Riggs and A. G. Prowse for the respondent; Raj Anand and Pauline R. Seville for intervener #1; Tom Christou for intervener #2; Gail Low, Susan Logan, Gerald Dancyger, Bella Streiner, Glenna Lewis; Glenda McNeilly, Rita Valter and Susan Morris for the objectors.

**DECISION OF THE BOARD;** February 19, 1981

1. This is an application for certification.

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4. The applicant union, hereinafter referred to as "AAHP", has applied to be certified as the exclusive bargaining agent for a bargaining unit of all paramedical employees at the respondent's hospital. The unit would include both paramedical employees employed in what may generally be described as a technical capacity (such as technologists, technical assistants and laboratory assistants employed in the haematology, radiology, nuclear medicine, respiratory, electrocardiograph, pharmacy and photography departments) as well as paramedical employees employed in a professional capacity (such as social workers, physiotherapists, psychologists, pharmacists, occupational therapists and dieticians).

5. The paramedical employees employed in a technical capacity are currently represented by intervener #1, Ontario Public Service Employees Union. The scope clause of the collective agreement does not extend to paramedical employees who may be broadly described as being employed in a professional capacity.

6. Through its application for certification, AAHP seeks both to displace the incumbent union as the bargaining agent of the technical paramedical employees and to become the exclusive bargaining agent for the professional paramedical employees. In the course of its displacement it is attempting to enlarge the existing bargaining unit.

7. In a displacement application for certification the Board will generally exercise its discretion under section 7(2) of the Act to order a representation vote among the employees in the incumbent's bargaining unit even if it is satisfied that more than fifty-five per cent of the employees in the bargaining unit are members of the applicant. In the representation vote the Board asks the employees to make a choice between the two competing unions.

8. In an application for certification where the union requests the taking of a pre-hearing representation vote the Board determines a voting constituency pursuant to section 8(2) of the Act. If it appears to the Board that not less than 35 per cent of the employees in the voting constituency are members of the applicant trade union, the Board directs that a representation vote be taken among the employees in the voting constituency.

9. Where there is a request for a pre-hearing representation vote on a displacement application, the Board's standard practice is to require the applicant to accept as a voting constituency the bargaining unit represented by the incumbent union. (See, for example, *Ethyl Canada Inc.* [1979] OLRB Rep. Oct. 985; *The Wellesley Hospital* [1976] OLRB Rep. Feb. 45; *Roland Lefebvre Lathing Limited* [1966] OLRB Rep. May 140.) If the applicant seeks to enlarge the bargaining unit the Board will establish two voting constituencies, the incumbent unit as one and the add-on segment as the other. To be entitled to a vote in each, the applicant must demonstrate membership support of 35 per cent in each voting constituency. (See *Ethyl Canada Inc.*, *supra*).

10. After a pre-hearing representation vote has been taken the Board determines the appropriate bargaining unit. Normally the bargaining unit found to be appropriate in a displacement situation is the incumbent's bargaining unit. The Board may amend the unit, however, in the event the applicant wins to vote, or votes if more than one voting constituency has been established. (See *Roland Lefebvre Lathing Limited*, *supra*.) In *Wellesley Hospital*, *supra*, however, the Board refused the company's request to carve out of the incumbent's unit



a group of employees. The Board expressed the view that when an applicant wins a displacement vote it is at least entitled to the same unit as was represented by the incumbent union.

11. In the instant displacement application, AAHP has not requested a pre-hearing vote. Accordingly, the Board does not need to determine a voting constituency pursuant to section 8(2) of the Act.

12. The Board is required under section 6(1) of the Act to determine the unit of employees that is appropriate for collective bargaining. If AAHP's application were not a displacement application but rather a fresh application relating to employees not already represented by a trade union, the Board, in all likelihood, would consider the broad, all paramedical employee unit applied for by AAHP to be appropriate. (See the Board's decisions in *Stratford General Hospital*, [1976] OLRB Rep. 459, and *Hôpital Montfort* [1980] Rep. Nov. 1647).

13. In a displacement application, however, the Board's general practice is to view the established bargaining structure as *prima facie* appropriate, particularly where the parties have themselves incorporated it into a collective agreement. In *Milltronics Limited* [1980] OLRB Rep. Jan. 56 the Board refused to accede to the employer's submission that a unit larger than the existing unit was appropriate. At p. 58 the Board said,

Usually . . . a "raiding union" must "take" what the incumbent union has.

(See also *Electrohome Limited*, [1967] OLRB Rep. Dec. 854).

14. In considering a displacement application for certification the Board has to be sensitive to the existence of an established bargaining relationship. The Board's practice of requiring the applicant to "take" what the incumbent has" emanates from the belief that the employees in an existing bargaining unit should alone decide, as a separate group, whether they want to change bargaining agents. In *Toronto Star Limited*, [1974] OLRB Rep. July 416 the vice-chairman, in his dissent on another point, explained the rationale supporting the Board's general practice. At p. 417 he said,

The reason for holding as appropriate the bargaining unit described in the scope clause of a collective agreement in a displacement application is because of the continued viability of the community of interests of employees affected by the application. It would be contrary to the efficacy of a past history of viable collective bargaining to upset the integrity of that bargaining unit without first soliciting the views of the employees affected.

15. In *Barnet-McQueen Co. Ltd.*, 59 CLLC ¶18,139 the Board was asked by the displacing union to find that a unit larger than the incumbent's unit was appropriate. The Board refused the request explaining that if it were to find a larger unit appropriate it would be possible for a union to displace another solely through its strength in the add-on portion of the unit and despite the views of the employees in the original or incumbent's unit. In *Barnet-McQueen* the Board dismissed the application because the applicant did not have sufficient membership support in the existing unit for a representation vote.

16. The instant case presents the Board with the reverse of the situation in *Barnet-McQueen*. The applicant union has in excess of 55 per cent membership support among the employees in the incumbent's bargaining unit. In the other segment of the enlarged bargaining unit for which it applies it does not have sufficient membership strength for a representation vote. If both the technical paramedical and professional paramedical segments were considered together as one bargaining unit, however, the applicant would have more than 45 per cent membership support.

17. Can the applicant union in a displacement application for certification sweep in a group of previously unrepresented employees solely on the strength of its membership support in the incumbent's unit and in the face of minimal support in the add-on group? Although the parties were unable to direct the Board to a case precisely on point, there are cases both from this Board and others which suggest that a displacing union should not be able to sweep in a group of previously unrepresented employees without sufficient and separate membership support in the add-on group.

18. In *Electrohome Limited, supra*, the Board commented at p. 857,

Had Local 804 in this case organized the additional employees it may well be that Local 804 would have been entitled to represent a bargaining unit which included a larger number of persons than was normally represented by the Amalgamated Workers Union [the incumbent]. However, Local 804 confined its organizing campaign to the unit of employees which was represented by the Amalgamated Workers Union and is not entitled to a unit which includes any additional persons. Therefore, since Local 804 has succeeded in defeating the Amalgamated Workers Union in the representation vote, Local 804 is... entitled to represent the employees formerly represented by the Amalgamated Workers Union.

19. In *Chapples Ltd.* [1974] OLRB Rep. Dec. 897 the applicant union applied to the Board for an amendment to its certificate to enlarge the bargaining unit. The Board noted that on a fresh application the requested bargaining unit might be deemed to be appropriate. Out of respect for the bargaining history of the parties, however, the Board refused the amendment stating that if the union wanted the additional segment of employees it would have to organize them.

20. The sweeping of unrepresented employees into an established bargaining unit is a question that has come before other tribunals in the context of applications made by existing bargaining agents for an amendment to an established bargaining unit.

21. In *British Columbia Telephone Company*, (1978) 2 Can. LRBR 387, the Canada Labour Board refused to amend the bargaining unit to include persons who had been excluded from the scope clause of the collective agreement. The union argued that the people in question would have been encompassed by the terms of the original "all employee" certificate issued by the Board if their classification had been in existence at the time. The parties, however, subsequently decided to define the scope clause of the collective agreement by specifically listing the classifications. The Board held that it would not include a new group of

persons in the bargaining unit without reference to the wishes of the employees sought to be included. In reaching its decision the Canada Board at p. 393 reasoned as follows:

We cannot accede to that position by the union. It flies in the face of a practical understanding and appreciation of collective bargaining realities and runs counter to fundamental principles expressed and incorporated in *The Canada Labour Code*. We accept the policy articulated by the British Columbia Labour Relations Board in *Automatic Electric (Canada) Limited, supra*, at p. 100.

The Board should not take a broad unit description, written a long time ago in a certification which served to get collective bargaining underway, and apply it in a literal fashion in the real-life employment environment which has been shaped by a later agreement by the parties about the precise scope of the unit. If, in fact, the effective unit specified by the collective agreement is a coherent and appropriate one and if the union has not violated its duty of fair representation in negotiating it, then this Board should accept that unit as the basis for further proceedings and if necessary vary the wording on the certification so that it will accurately reflect the current realities. If the union then wishes to expand the scope of its bargaining authority over a group of employees whom it has not hitherto represented . . . it should first organize these employees.

The Canada Board then went on at pp. 393-395 to elaborate the policy reasons behind its decision to decline to incorporate into the unit a new group of employees without reference to their wishes:

The reasons for this policy are multiple and do not need extensive elaboration. Among them are the following. First, the incorporation of employees previously unrepresented into a bargaining structure without reference to their wishes places easily foreseeable strains upon the relationship between the employer, the union and the employees. . . . The addition of employees to an established bargaining relationship without reference to their wishes creates immediate and foreseeable conflicts between them and employees in the established bargaining structure. This conflict can be expressed by employees who are added to the unit refusing to participate in internal union affairs, refusing to respect picket lines established by the union, and acting on behalf of extra-bargaining unit employees, or maybe even the employer, to undermine the authority and activities of the union. The predictable results are industrial unrest and an undermining of the role of trade unions in industrial society.

Secondly, an accretion to a bargaining unit of employees who have been hitherto excluded from the bargaining structure without reference to their wishes can result in a lost of society's perception of the integrity of the collective bargaining system and its fairness. . . .

. . . The tradition of collective bargaining legislation in Canada,



reflected in the provisions of the Code, contains the implicit understanding that a trade union becomes the bargaining agent for employees only through an expression of a desire for representation by a majority of employees it has not represented. To run counter to that tradition, in this case, where the union relinquished the benefits of the "all employee" description in its bargaining unit, would create a hostility to collective bargaining by the employees added to the bargaining unit and the understandable impression that the collective bargaining system under the Code was designed or being administered for the benefit of trade unions as institutions and not for the interests of employees. This would be even more emphatically the case in the circumstances of this application where the Board has received active representation and express communication by a large number of persons in the classifications sought to be added to the unit expressing a desire not to be represented by the applicant union.

. . . As in the Canadian jurisprudence referred to above, the American position is that

it is axiomatic that, where a classification has been historically excluded from a unit, it cannot be added by means of the accretion doctrine; i.e., without affording employees in that classification an opportunity to select or reject the bargaining representative. (*Williams Transportation Company* (1977), 96 LRRM 1597 (N.L.R.B.))

A third reason for the policy articulated in *Automatic Electric (Canada) Limited* as it applies to this case is that if the Board acceded to the union's request we would ignore the interests of employees who have grown to accept and expect that their employment relationship is regulated in a manner other than by representation by the applicant union.

22. In the instant case the paramedical employees, broadly described as being employed in a professional capacity, have been unrepresented by a trade union. The technical paramedical employees, on the other hand, have been represented by the incumbent. This is a bargaining framework with which the parties have become accustomed. In the Board's opinion it would be unfair, inappropriate and counter to sound labour relations to suddenly place the professional paramedical group of employees in a bargaining unit with the technical paramedical employees, thereby opening the door to their being represented by the applicant union, without giving them an opportunity to decide, as a separate group, if they want union representation.

23. There are limits to the principle of majoritarianism and in this case that principle must be tempered by the established bargaining history. Just as in *Barnet-McQueen* the Board would not allow an incumbent to be displaced solely on the strength of people in an add-on segment of an enlarged bargaining unit, so too in this case the Board will not allow the incumbent to sweep in previously unrepresented employees solely on the strength of their support in the incumbent's bargaining unit. In a fresh application for certification persons or

even groups of persons who do not wish to be represented by a trade union may, nevertheless, be swept into a bargaining unit. In that situation, unlike the one before us, however, those persons will not have developed a history of being excluded from the particular bargaining unit in question. Where there is such a history, a balancing of interests requires that they not be swept into the unit without regard to their wishes.

24. For the reasons set out above the Board finds in this case that the incumbent's bargaining unit is the unit appropriate for collective bargaining. That bargaining unit is:

all paramedical personnel employed by Toronto East General and Orthopaedic Hospital Inc. at Toronto, save and except charge technologists, assistant chief technologists, persons above the rank of charge technologist and assistant chief technologist, students in training, students employed after regular school hours or during the university or school vacation period, persons regularly employed for not more than 24 hours per week, office and clerical staff and persons covered by subsisting collective agreements with the Service Employees International Union, Local 204, the Canadian Union of Operating Engineers, and the Ontario Nurses' Association. (hereinafter referred to as bargaining unit #1)

For the purposes of clarity "paramedical personnel" includes: technologists, formerly known as registered technicians, non-registered technicians, technical assistants, laboratory assistants employed by the Hospital in the haematology, radiology, medical laboratory, nuclear medicine, respiratory and electrocardiograph, pharmacy and photography departments.

25. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #1, at the time the application was made, were members of the applicant on November 25, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

26. Pursuant to its discretion under section 7(2) of the Act the Board orders that a representation vote be taken of the employees of the respondent in bargaining unit #1. All employees of the respondent in bargaining unit #1 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

27. Voters will be asked to indicate whether they wish to be represented by the applicant or the incumbent union in their employment with the respondent.

28. For the reasons canvassed above the bargaining unit found appropriate by the Board in this case does not include the employees not covered by the incumbent unit. The Board will not sweep in this group of employees without regard to their wishes. The Board, therefore, will treat the add-on segment or the portion of the unit applied for by the applicant

which does not correspond to the incumbent bargaining unit as, virtually, the object of a separate application for certification.

29. The Board is satisfied on the basis of all the evidence before it that with or without the inclusion of the challenged persons less than forty-five per cent of the employees of the respondent in the add-on bargaining unit (hereinafter referred to as bargaining unit #2) at the time the application was made were members of the applicant on November 25th, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 70(1) of the said Act.

30. The application as it relates to bargaining unit #2 is dismissed.

31. The matter is referred to the Registrar for the representation vote in the incumbent's unit, bargaining unit #1.

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## **2090-80-R Chemistry Graduate Students' Association of the University of Ottawa, Applicant, v. University of Ottawa, Respondent.**

**Bargaining Unit – Trade Union Status – Graduate Students' Association seeking union status – Whether proper procedure followed in formation of union – Whether viable entity for purposes of collective bargaining – Whether unit restricted to Chemistry Department appropriate**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**ASPPEARANCES:** *Martin Laplante for the applicant; Pierre-Yves Boucher and Dean Peter Morand for the respondent.*

**DECISION OF THE BOARD;** February 19, 1981

1. This is an application for certification.

2. The applicant has not previously established its status as a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*. Upon being advised by the Registrar, it adduced evidence at the hearing to satisfy that requirement.

3. The applicant is an association of graduate students in the chemistry department of the University of Ottawa. It exists as a subordinate association of the Graduate Students Association of the University of Ottawa, itself an organization under the greater umbrella of the Students Federation of the University of Ottawa. It is not seriously challenged that the applicant Association has existed for years as an Association of graduate students in chemistry dedicated to the advancement of the interests of its membership. It has carried out its activities under a constitution through duly elected officers.



4. In September of 1980 a general meeting of the Association resolved to establish a committee to revise its constitution. After notice was given to the members of the Association a general meeting was held on November 5, 1980 at which an amended constitution was presented to the membership for their approval. The revised constitution was passed unanimously. It included an article adding as one of the aims of the Association the pursuit of collective bargaining for graduate students employed by the University.

5. At the time of the meeting there was some uncertainty in the Association as to the exact number of its membership. Under the constitution all graduate students in chemistry are members, but it appears that only the University has precise knowledge of the identity and number of all students who would so qualify. Unfortunately the Association's officers were unable to obtain an accurate number from the University. The officers of the Association were fairly certain that the full membership numbered some 28. The material filed by the University in this application indicates the correct number is 33. Because there were only some fifteen members present at the meeting, the Association's officers determined to cure any risk that a quorum of fifty per cent plus one was not present when the constitution was amended. This they did by circulating a ratification petition. The unchallenged evidence is that it was signed by twenty-four of the Association's members in the period immediately following the meeting of November 5, 1980. Further, to comply with the evidentiary requirements of the Board in certification proceeding, the Association gave a printed membership card to the twenty-four members who signed the ratification petition and collected \$1.00 from each of them. In support of this application the Association submitted both the petition, by which the signatories empower the Association to act as their collective bargaining representative, and the receipts for the payment of \$1.00, signed by both the student member and the Association's collector.

6. The procedures detailed above are in many respects unusual when compared to the normal steps customarily taken when a group of employees establish a new association to bargain collectively on their behalf. The Association's representative pleads the special circumstances of this case, stressing that the applicant was a pre-existing Association of long-standing. Even counsel for the University conceded that it would be artificial to view the applicant Association as a wholly new organization, even though it purported to abolish its old constitution and adopt an entirely new one at the meeting of November 5, 1980. Before that meeting the Association had a constitution, duly elected officers and members for whom dues are deducted out of tuition payments by the University. The membership funds are either forwarded to the Association through the Students Federation or diverted to a university charity on an "opt out" formula for students who do not wish to participate. There is no evidence before the Board of any graduate student in chemistry having opted out of membership.

7. Counsel for the University submits that the Association's attempt to reform its constitution is flawed in three respects. Firstly, he attacks the amendment of the constitution in the apparent absence of a quorum at the general meeting which approved the new constitution. Secondly, he questions the authority of the Association's officers to discharge any functions, or indeed to hold office under the new constitution. Lastly, he submits that the Association cannot be viewed as a union because under its constitution it does not in his words "control its own membership" since any graduate student in chemistry is *de facto* a member of the Association.

8. The first thing to be determined is whether the Association is a body which draws

its life and existence from a constitution which includes among its aims the representation of of its members in their employment relationship with the University. It should be emphasized that for the Board this is not a technical concern with no purposive foundation. In *James B. McGregor – Division of Toby Industries Limited*, [1976] OLRB Rep. Oct. 643 the Board commented at p. 644:

As was stated by this Board in *J. Harris & Sons Ltd.* ‘... the constitution of the applicant is the source and limit of its existence...’. The Board’s concern for the constitution and the regularity of its adoption in that circumstance is not borne of devotion to mere technicality, but of the Board’s fundamental concern that the applicant be a viable entity to carry out the purposes described in section 1(1)(n) of *The Labour Relations Act*. If a constitution were not properly adopted or, if properly adopted, not properly adhered to, questions might arise as to whether those who purported to be its officers duly appointed or elected under the constitution were indeed its officers at all, and if not, whether it could be considered a viable entity for carrying out the purposes described in the Act. Needless to say, those concerns must always be satisfied when the Board inquires into the status of an applicant organization...

9. In *National Steel Car Corporation Limited*, [1979] OLRB Rep. June 542 the Board was faced with a fact situation somewhat similar to the instant case. An association of employees met and elected a group of officers. The officers subsequently prepared a constitution. There was, however, no subsequent meeting or ratification of the constitution. The association then gathered membership documents signed by the employees and tendered them to the Board with its application. The Board found that the association had a constitution and officers, but that it had not satisfied the requirement of proving that its constitution had been duly ratified by a meeting of the membership. It specifically rejected the contention of the association that the signing of membership applications and the payment of the initiation fee amounted to a sufficient ratification of the constitution by the membership.

10. In the instant case the constitution of the Association is silent on the method by which it is to be ratified. The best evidence on that point is the testimony of Mr. Laplante, the secretary treasurer of the Association and the only witness called on its behalf. It is clear from his testimony that a quorum voting at a meeting after prior adequate notice was seen by the Association’s officers as necessary to ratify the constitution. That procedure would, moreover, be in keeping with the traditional requirements of the Board. In this case, however, that was not followed. Because of inadequate attendance the Association’s attempt to have its constitution ratified at the general meeting of November 5, 1980 was ineffective. The Association then sought to have its constitution ratified by having individual employees indicate their wish to ratify the constitution on the same document by which they authorized the Association to act as their bargaining agent.

11. In the face of that evidence the Board must have some fundamental concerns. The officers of the Association radically departed from the procedure which they themselves felt bound to follow, being the procedure which this Board in its decisions has indicated should insofar as possible, be adhered to. We must have serious doubts that an association is a viable entity for the purposes of collective bargaining when by its own standards the procedure by which its constitution was established or amended is an obvious doubt. The constitution by which it purported to become a union is, on the most generous view of the facts, under a cloud.

12. So are its officers. Mr. Laplante's evidence is that the matter of proposing a new election of officers was suggested at the meeting of November 5, 1980. When no one made any motion it appears that the officers under the previous constitution were presumed to continue in office. There was, however, no motion to reconfirm them in office either at the abortive meeting or in the subsequent petition. While the Board should allow the broadest latitude for employees unfamiliar with constitutions and the procedures of associations, it must at a minimum be satisfied that an applicant for certification is a viable entity with duly confirmed officers. We must, moreover, have obvious concerns about the viability of an association which has apparently been unable to hold a single "meeting" within the definition of its own constitution for the purpose of ratifying that constitution. In our view it is not too much to expect these basic conditions to be met before this Board is satisfied that an association has the minimal qualifications that entitle it to the rights and privileges of a trade union under the Act. For the foregoing reasons, and for those expressed in *National Steel Car Corporation Limited* the Board cannot find that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

13. In light of that conclusion the Board need not deal with the two alternative arguments of counsel for the University. It is also not necessary for the Board to deal with the separate question of the bargaining unit. That matter was fully argued, however, and in light of the effort expended by the Association and the possibility that it might go through the pains of another constitutional revision for the sole purpose of filing a new application, the Board feels that it should make some comment for the future guidance of the parties. The Association applied for a bargaining unit comprised solely of graduate students in chemistry employed as laboratory demonstrators, teaching or research assistants or otherwise salaried by the University. It is common ground that the students in question work only in the chemistry department. The University maintains that the appropriate bargaining unit should include graduate students employed as laboratory demonstrators as well as research and teaching assistants in all faculties and departments of the University.

14. In every application for certification the Board had a duty under section 6(1) of the Act to "determine the unit of employees that is appropriate for collective bargaining". In responding to that statutory obligation the Board strives to fashion groupings of employees that will constitute a rational and viable bargaining structure. Factors to be taken into account include the nature of the work performed, conditions of employment, skills of employees, the administrative structures of the employer, the geographic circumstances of the workplace and the functional coherence and interdependence of the work performed by the employees. (See *Usarco Ltd.*, [1967] OLRB Rep. Sept. 526).

15. In some instances the Board must be careful to give adequate weight to the wishes of self-determination of a given group of employees. The most comprehensive unit contended for is not necessarily the most appropriate. The Board is therefore not inclined to find bargaining units whose very size and complexity will make them virtually impossible to organize, so that the Board's very determination of the bargaining unit effectively puts collective bargaining out of reach of the employees. (*The Board of Education of the City of Toronto*, [1970] OLRB Rep. July 430; *McDonald's Restaurants of Canada Limited*, [1974] OLRB Rep. Oct. 755; *Ponderosa Steak House (a division of Foodex Systems Limited)*, [1974] OLRB Rep. Nov. 7; *Woodward Stores (Vancouver) Limited*, [1975] 1 Can LRBR 114; *Canada Trustco Mortgage Co.*, [1977] OLRB Rep. June 330.)

16. An equally real concern is that the Board not grant bargaining rights simply on the



basis of the wishes of the smallest definable unit of employees. In the instant case the Association argues that it should not be denied the wishes of its members nor should it be required to organize on a broader base. That argument fails, however, to appreciate that the interests of the employer are also to be considered in establishing a bargaining unit. We must always be concerned whether establishing a single small bargaining unit is not taking the first step in a set of incremental decisions that will result in an unwieldy number of fragmented units in the future. As the B.C. Labour Board commented in *Insurance Corporation of British Columbia*, [1974] 1 Can LRBR 403 at p. 406:

If we follow the logic of pure freedom of choice to its ultimate point, then every time a new group of employees wanted to carve out a different bargaining unit and select a new representative this should be permissible. Right now that is not the case and once an appropriate unit has been settled and collective bargaining has begun, a strong presumption exists against changing it. As new unions come in to organize remaining segments of the employees, their certifications will be erected around the original one. The result is often a chaotic patchwork of bargaining units dividing up the employees of one employer, a situation which it is almost impossible to rationalize later on.

17. In our view the foregoing passage makes the appropriate response to the argument of the Association. There are 63 academic departments in the University of Ottawa with some 30 graduate students associations like the applicant, some of which encompass more than one department. In our view to certify on the basis of a departmental bargaining unit would set the stage for confused pattern of multiple bargaining units which would have serious drawbacks for the employer as well as for the employees concerned. There would be obvious cost and dislocation to the University if it should be required to negotiate and administer what could potentially be a mass of collective agreements in a series of fragmented units whose members essentially perform the same kinds of functions. It is also obvious that employee groups so small and separated would not have the bargaining authority or the administrative coherence that would flow from the establishment of a single bargaining unit university wide. Those are consequences to be avoided.

18. We see no reason, moreover, to believe that it would impose an unrealistic standard to require that students employed by the University of Ottawa organize on a university wide basis. Their professors have done so without apparent difficulty. (*University of Ottawa*, [1975] OLRB Rep. Sept. 694). The Board has had prior occasions to consider the appropriateness of graduate assistants' bargaining units. On one occasion it found the more comprehensive designation of all graduate and undergraduate students within a university employed as research assistants and teaching assistants to be an appropriate bargaining unit. (*Carleton University*, [1978] OLRB Rep. Feb. 179). In an earlier decision the Board found that all graduate students employed as teaching assistants at York University were an appropriate bargaining unit (*York University*, [1975] OLRB Rep. Sept. 683).

19. The issue of whether the appropriate bargaining unit should comprise both graduate and undergraduate students employed as teaching assistants and research assistants is a determination that must depend on the facts of each particular case. The Board does not adopt an inflexible policy in any given application. But where the Board's experience has evolved policies and principles conducive to sound collective bargaining, there is a heavy

onus on any party seeking to satisfy the Board that a departure from its policies is justified. In the instant case, assuming that the applicant had satisfied the requirement of union status, for the reasons canvassed above we would not have found the graduate students employed in the chemistry department of the University of Ottawa to constitute an appropriate bargaining unit.

20. The application is hereby dismissed.

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**2144-80-R: Gerald Cobham, Applicant, v. International Union United Plant Guard Workers of America, Local 1962, Respondent, v. Group of Employees, Objectors, v. Wells Fargo Armoured Express Limited, Employer**

**Termination – More than 45 per cent of employees in unit signifying they no longer wish to be represented by respondent – Board directing vote**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** *Michael G. Horan and Gerald Cobham for the applicant; Chris G. Paliare and Watson E. Cooke for the respondent; Leo Longo for the group of objectors.*

**DECISION OF THE BOARD:** February 23, 1981

1. The name: “International Union, United Plant Guard Workers of America and its affiliated Local No. 1962” appearing in the style of cause of this application as the name of the respondent is amended to read: “International Union United Plant Guard Workers of America, Local 1962”.

2. The applicant has applied to the Board under section 49 of *The Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

3. Having regard to the evidence, the Board is satisfied that not less than forty-five per cent of the employees of the Wells Fargo Armoured Express Limited in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent union on January 20, 1981, the terminal date fixed for this applicatin and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said Act.

4. The Board directs that a representation vote be taken of the employees of Wells Fargo Armoured Express Limited. Those eligible to vote are all employees of the employer at his plant located at 62 Bertal Avenue, (formerly 164 Avenue Road), save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than

24 hours per week on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

5. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Wells Fargo Armoured Express Limited.

6. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER O. HODGES;**

1. Considering all of the evidence and in the circumstances of this case, I find with my colleagues that the petition to decertify the union is a voluntary expression of the employees who signed it. The Board will therefore order a vote which will determine whether the union will continue to represent the employees or whether there will be no union to represent the employees.

2. The applicant Gerald Cobham originated, prepared and circulated the termination petition. He testified "it was my own idea". Mr. Cobham also told the Board that he had worked for Wells Fargo for more than three years and that he had been the shop steward of the union for the latter two years, handling grievances, etc. While he did not hold a union position when the collective agreement was negotiated, he was displeased that the agreement was for three years and he voted against accepting the settlement. In his opinion, it was not a fair deal because "Montreal got more".

3. Mr. Cobham testified in cross-examination that he was instructed in the petition procedure by a Teamsters union steward employed by another company. Cobham was first told "no" by the Teamsters when he spoke to his contacts in that union about them organizing Wells Fargo, indicating to him that there was a "no raid pact". He told the Teamsters "I will sign them up". His Teamsters advisors subsequently told him to first get the United Plant Guard Workers decertified.

4. *The Labour Relations Act*, provides for the displacement of one union by another, and counsel for the Plant Guards put that possible alternative to Cobham. The witness replied that the Teamsters had said "get decertified first". It should be apparent to the employees and to Cobham that decertification will leave them without a union for some time, whereas a displacement of one union by another would continue union representation by the "raiding" union without a breach were it to win the representation vote which the Board would hold in such a case.

5. Counsel for the Plant Guards argued that the Teamsters had been refused certification by the Ontario Labour Relations Board in the case of *Wells Fargo Armoured Express Ltd.*, [1972] OLRB Rep. Jan. 5 page 22. In that case the Board said:

"2. By letter dated November 26, 1971, the respondent challenged the Board's jurisdiction to certify the applicant on the grounds that the employees with whom we are here concerned are employed by the respondent as guards within the meaning of section 11 of the Act and the applicant admits to membership persons other than guards.



3. The applicant agreed that the Board should make its determination of the issue raised by the respondent and for the purpose of this proceeding waived any objection it might have to the timeliness of the respondent's challenge to the Board's jurisdiction.

4. Section 11 of the Act reads as follows:

The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any persons who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

5. The applicant acknowledged that it is a trade union that admits to membership and is chartered by a trade union that admits to membership persons other than guards.

6. The evidence established that all the employees in the bargaining unit are uniformed and carry sidearms. They operate armoured vehicles owned by the respondent and work in three-man crews consisting of a driver guard who performs the driving function, a messenger guard who sits opposite the driver and a guard who sits in the back of the vehicle at all times. The employees rotate in the various positions and on any given day, each employee may function in any one of the three positions.

7. The driver guard accompanies the messenger guard while pick-ups and deliveries of valuables are made. The vehicle guard remains inside the vehicle. All three in combination perform the protective function required.

8. The respondent operates its vehicles under a Public Commercial Vehicle Operating Licence which reads as follows:

For the transportation in 'armoured vehicles' operated by a driver accompanied by at least one uniformed security guard, licensed under the Private Investigators and Security Guards Act, (Statutes of Ontario 1965, Chapter 102) of bullion, coins, currency, precious metals, negotiable instruments and other articles or commodities of unusual value which Consignors and/or Consignees require to be transported in armoured vehicles from points in the Province of Ontario to the Ontario-Quebec border at all border crossing points for furtherance to points in the Province of Quebec as authorized and from the Ontario-Quebec border at all border crossing points to points in the Province of Ontario.

PROVIDED that "armoured vehicles" mean 'vehicles specially

constructed with bodies or armoured plate and windows of bullet proof glass'.

9. All of the employees in the bargaining unit are licensed under *The Private Investigators and Security Guards Act*, RSO 1970, c. 362.

10. The employees of some of the respondent's customers are presently represented by the applicant union.

11. Having regard to the nature of the function performed by the employees and the type of vehicle driven by them, we find that the employees are not merely truck drivers and helpers. their prime functions is that of a guard within the meaning of section 11 of the Act. In this case we are not dealing with an employee who is required to transport valuables as an incidental function to the employee's primary duties and responsibilities such as an office clerk who is required to make regular bank deposits. Every employees, to a greater or lesser degree, is required to protect the property of an employer over which he has custody or control. A guard for the purpose of section 11 of the Act must be primarily employed as a guard to protect the property of an employer.

12. Since we have found that all the employees in the bargaining unit are employed as guards within the meaning of section 11 of the Act and since the applicant admits to membership persons other than guards, we are precluded by the provisions of section 11 from certifying the applicant as bargaining agent for such employees of the respondent.

13. We accordingly revoke our decision dated October 5, 1971 in this matter.

14. For the reasons set out above, this application is therefore dismissed."

6. Cobham and his Teamsters advisors may not have been aware of the earlier decision of the Board wherein the application of the Teamsters for Wells Fargo Armoured Express Ltd. was finally dismissed. It is in the interest of the employees to know about the earlier case, and to understand that the law was not changed.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1981

### BARGAINING AGENTS CERTIFIED DURING JANUARY

#### No Vote Conducted

**0150-79-R; 0153-79-R;** Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 (Applicant) v. Fuller's Restaurant (Respondent) v. Group of Employees (Objectors).

Unit #2: "all employees of the respondent working at 809 Richmond Road, Ottawa, Ontario, who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant managers, management trainees, kitchen managers and persons above those ranks, and office staff." (18 employees in the unit).  
(*Bargaining Unit #1 – See Certification Dismissed Subsequent to Post Hearing Vote*).

**0269-80-R;** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Colonist Homes Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sectors of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors of the construction industry in the County of Grey." (5 employees in the unit).

**0363-80-R; 0412-80-R;** United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Square D Canada Electrical Equipment Inc. (Respondent) v. Square D Employees' Association (Intervener).

Unit: "all employees of the respondent in Waterloo, save and except foremen, persons above the rank of foreman, office and clerical staff, sales staff, engineering staff, quality control technicians, persons employed for not more than 24 hours per week and students regularly employed during school vacation period." (55 employees in the unit). (*Having regard to the agreement of the parties*).

**0942-80-R;** Ontario Public Service Employees Union (Applicant) v. Tillsonburg and District Association for The Mentally Retarded (Respondent).

Unit: "all employees of the respondent employed in or out of Oxford County and the Regional Municipality of Haldimand Norfolk, save and except Director, Managers, Program Consultants, Farmhouse Head Counsellor, Apartment Support Worker, and persons above such ranks, office and clerical employees, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (32 employees in the unit). (*clarity note*).

**1119-80-R;** Hotel, Restaurant and Cafeteria Employees' Union, Local 75, Toronto, of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.I.O.-C.L.C.) (Applicant) v. Diana Sweets Ltd. (Respondent) v. Group of Employees (Objectors).

Unit #2: "all employees of the respondent at Scarborough Town Centre regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except head chef, host(ess), those above the rank of head chef and host(ess), and office staff." (19 employees in the unit). (*clarity note*).  
(*Bargaining Unit #1 – See Applications Certified Subsequent to a Post-Hearing Vote*).

**1125-80-R:** International Ladies' Garment Workers' Union (Applicant) v. Newport Sportswear Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (4 employees in the unit).

**1192-80-R:** The Retail Clerks Union, Local 409 (Applicant) v. Western Grocers, Division of Westfair Foods Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office employees of the respondent in the City of Thunder Bay, Ontario, save and except manager, assistant manager, persons above the rank of assistant manager, accountant, salesperson, merchandiser and confidential secretary." (13 employees in the unit).

**1491-80-R:** Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (AFL-CIO-CLC) (Applicant) v. Burlington Post and Weekend Post, Divisions of Inland Publishing Co. Limited (Respondent).

Unit: "all employees in the Editorial Department of the respondent in Burlington, save and except the publisher, editor, news editor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (9 employees in the unit). (*clarity note*).

**1515-80-R:** Graphic Arts International Union, Local 588 (Applicant) v. University of Ottawa (Respondent).

Unit: "all employees of the respondent employed in Reprographic Services (K Category), at Ottawa, save and except supervisors, foremen, persons above the rank of supervisor and foreman, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period," (32 employees in the unit). (*Having regard to the agreement of the parties*).

**1554-80-R:** Labourers' International Union of North America – Local 183 (Applicant) v. Duracon Precast Industries Ltd. (Respondent).

Unit: "all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (33 employees in the unit). (*Having regard to the agreement of the parties*).

**1607-80-R:** The International Ladies Garment Workers Union (Applicant) v. Josh Industries Incorporated (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, designers, sample and pattern makers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (5 employees in the unit).

**1642-80-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. G.H. Johnson's Furniture (Ottawa) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (11 employees in the unit). (*clarity note*).

**1673-80-R:** Hotel, Restaurant & Cafeteria Employees Union – Local 75 (Applicant) v. Peel County Feed Company Inc. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at Rexdale, Ontario, save and except head chef, maitre d’, supervisors, persons above the rank of superiors, sales staff, accounting staff and office staff.” (96 employees in the unit). (*Having regard to the agreement of the parties*).

**1744-80-R:** Teamsters, Local Union No. 990, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Mount McKay Feed Company, Limited (Respondent).

Unit: “all employees of the respondent at Thunder Bay, Ontario, save and except formen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

**1786-80-R:** Teamsters Local Union No. 990, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. V. & T. Trucking Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent working at and out of Thunder Bay, save and except formen, persons above the rank of foreman, office and sales staff.” (12 employees in the unit). (*Having regard to the agreement of the parties*).

**1804-80-R:** Canadian Union of Public Employees (Applicant) v. Manitoulin Health Centre (Respondent).

Unit #1: “all employees of the respondent at Little Current, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate and student dietitians, professional personnel, supervisors, persons above the rank of supervisor, office, clerical, and technical personnel, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees covered by a subsisting agreement.” (34 employees in the unit).

Unit #2: “all employees of the respondent at Little Current, Ontario, regularly employed for less than 24 hours per week save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate and student dietitians, professional personnel, supervisors and persons above the rank of supervisor, office, clerical, and technical personnel, persons employed during the school vacation period and employees covered by subsisting collective agreements,” (18 employees in the unit).

**1820-80-R:** International Association of Machinist & Aerospace Workers (Applicant) v. General Equipment Manufacturing Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in the City of St. Thomas in the County of Elgin, save and except foremen, persons above the rank of foreman, engineering personnel, office and sales staff and, pending the final determination of the matters in dispute excluding as well inspectors, fixture fabricators, supervisors and R & D personnel.” (42 employees in the unit).

**1829-80-R:** The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666,681, 1133, 1304, 1747,1963,3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Anthes Equipment Limited (Respondent).

Unit: “all carpenters and carpenters’ apprnices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of



Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1830-80-R:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Grant Construction, Division of Malachy Grant & Associates Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1854-80-R:** United Brotherhood of Carpenters and Joiners of America – Local Union 93 (Applicant) v. Newcarl Co. Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**1897-80-R:** Canadian Union of Public Employees (Applicant) v. Niagara Frontier Humane Society (Respondent).

Unit: "all employees of the respondent in Niagara Falls, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except manager, persons above the rank of manager and persons covered by a subsisting collective agreement." (5 employees in the unit). (*Having regard to the agreement of the parties*).

**1906-80-R:** London and District Service Workers' Union, Local 220 (Applicant) v. The Corporation of the City of London (Dearness Home) (Respondent).

Unit: "all office and clerical employees of The Corporation of the City of London at the Dr. John Dearness Home for Elder Citizens regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the home administrator the assistant administrator, the manager of administrative services, secretaries to the home administrator, and persons covered by subsisting collective agreements." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**1912-80-R:** Labourers International Union of North America Local 837 (Applicant) v. Doug Wright Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

**1913-80-R:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Air Products, Division of Catalytic Enterprises Limited (Respondent).

Unit: “all employees of the respondent at Brampton, Ontario, save and except foremen, persons above the rank of foreman, customer station mechanics, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.” (13 employees in the unit). (*Having regard to the agreement of the parties*).

**1926-80-R:** The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494; 1007; 1410; 1425; 1592; 1669; 1916 and 2309 (Applicant) v. Imicon Construction Ltd. (Respondent).

Unit: “millwrights and millwrights’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all millwrights and millwrights’ apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakvill and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**1930-80-R:** Christian Labour Association of Canada (Applicant) v. Niagara Motive Supply Co. Limited, carrying on business under the firm name and style of Speed “n” Sport Canada (Respondent).

Unit: “all employees of the respondent in St. Catharines, Ontario, save and except foremen, persons above the rank of foreman, office and outside sales staff.” (15 employees in the unit).

**1936-80-R:** Canadian Union of Public Employees (Applicant) v. The Fort Erie Public Library Board (Respondent).

Unit: “all employees of the respondent in Fort Erie, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except the secretary to the Chief Librarian, the Deputy Chief Librarian, persons above such rank and persons covered by subsisting collective agreements.” (14 employees in the unit). (*Having regard to the agreement of the parties*).

**1937-80-R:** United electrical, Radio and Machine Workers of America (UE) (Applicant) v. Ethicon Sutures Ltd. (Respondent).

Unit: “all office, clerical and technical employees of the respondent in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, personnel assistants, histologist, professional engineers, sales staff, secretaries to the President and Division Heads and persons covered by existing collective agreements.” (75 employees in the unit). (*Having regard to the agreement of the parties*).

**1951-80-R:** Office and Professional Employees International Union (Applicant) v. Keen Community Credit Union Limited (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Hamilton-Wentworth regularly employed for not more than twenty-four (24) hours per week save and except supervisor and those above the rank of supervisor.” (11 employees in the unit). (*Having regard to the agreement of the parties*).

**1961-80-R:** Teamsters, Chauffeurs, warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Township of Bosanquet (Respondent).

Unit #1: “all outside employees of the respondent, save and except garbage superintendent, roads superintendent, persons above the rank of garbage superintendent and roads superintendent and students employed during the school vacation period.” (3 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Unit #2: "all office and clerical employees of the respondent, save and except clerk treasurer, persons above the rank of clerk treasurer, confidential secretary to clerk treasurer and building inspector." (2 employees in the unit). (*Having regard to the agreement of the parties*).

**1962-80-R:** Ontario Public Service Employees Union (Applicant) v. Religious Hospitallers of St. Joseph of the Hotel Dieu of Kingston (Respondent) v. Ontario Nurses' Association (Intervener) v. Group of Employees (Objectors).

Unit: "all (lay) employees of the respondent in Kingston, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, pharmacists, graduate dieticians, student dieticians, office and clerical staff, technical personnel, para-medical personnel supervisors, foremen, persons above the rank of supervisor and foreman, chief engineers, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, students who are in training as part of an academic programme, persons covered by subsisting collective agreements and persons represented by the Ontario Nurses Association by virtue of Board, certificates dated August 19, 1980 and October 16, 1980, (Board file #0967-80-R)." (197 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

**1970-80-R:** Retail, Wholesale and Department Store Union, AFL: CIO: CLC (Applicant) v. National Grocers Co. Ltd. (Respondent).

Unit: "All employees of the respondent at its Steelton Red & White Store, Sault Ste. Marie, regularly employed for the more than twenty-four hours per week and students employed during the school vacation period, save and except persons covered by subsisting collective agreements between Retail, Wholesale and Department Store Union, AFL: CIO: CLC, Local 582 and the respondent." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**1972-80-R:** The Canadian Union of Public Employees (Applicant) v. The Smith Hospital Limited (Respondent).

Unit: "all employees of the respondent in Hawkesbury, Ontario, save and except supervisors and persons above the rank of supervisor, office, clerical and technical staff, professional medical staff, graduate nursing staff, undergraduate nursing staff, registered nurses, graduate dietician, student dietician, graduate pharmacist, and undergraduate pharmacist." (72 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

**1985-80-R:** Ontario Nurses' Association (Applicant) v. Grey Owen Sound Joint Homes for the Aged (Grey-Owen Lodge) (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Markdale, Ontario, save and except nursing supervisor and persons above the rank of nursing supervisor." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**1986-80-R:** Ontario Nurses' Association (Applicant) v. Grey Owen Sound Joint Homes for the Aged (Lee Manor) (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Owen Sound, Ontario, save and except nursing supervisor and persons above the rank of nursing supervisor." (7 employees in the unit). (*Having regard to the agreement of the parties*).

**1988-80-R:** Ontario Nurses' Association (Applicant) v. Cornwall General Hospital (Respondent) v. Group of Employees (Objectors).

Unit #1: "all registered and graduate nurses employed in a nursing capacity at the Cornwall General Hospital, Cornwall, save and except head nurses and persons above the rank of head nurse, employee health nurse, and persons regularly employed for not more than twenty-four hours per week." (76 employees in the unit). (*Having regard to the agreement of the parties*).



Unit #2: “all registered and graduate nurses employed in a nursing capacity at the Cornwall General Hospital, Cornwall, regularly employed for not more than twenty-four hours per week, save and except head nurses, persons above the rank of head nurse and the employee health nurse.” (59 employees in the unit). (*Having regard to the agreement of the parties*).

**2006-80-R:** Hotel and Restaurant Employees Union, Local 743, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO-CLC (Applicant) v. Sneaky Pete’s Total Food Systems Limited (Respondent).

Unit: “all the employees of the respondent employed at Sneaky Pete’s Devonshire Mall, Windsor, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours and students employed during the school vacation period.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

**2007-80-R:** Hotel and Restaurant Employees Union, Local 743, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO-CLC (Applicant) v., Sneaky Pete’s Total Food Systems Limited (Respondent).

Unit: “all employees of the respondent employed at Sneaky Pete’s Devonshire Mall, Windsor, who regularly work not more than twenty-four (24) hours per week and students employed during the school vacation period save and except supervisors and persons above the rank of supervisor.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

**2016-80-R:** International Union of Operating Engineers, Local 793 (Applicant) v. C & M McNally Engineering Inc. (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**2017-80-R:** International Association of Machinists & Aerospace Workers (Applicant) v. 351121 Ontario Limited (Respondent) v. Group of Employees (Intervenors).

Unit: “all employees of the respondent in the City of St. Thomas, Elgin County, save and except, foreman, persons above the rank of foreman, office and sales staff.” (22 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

**2025-80-R:** Canadian Union of Public Employees (Applicant) v. Public Utilities Commission of the Town of Goderich (Respondent).

Unit: “all employees of the respondent, in the Town of Goderich, save and except Superintendent and persons above the rank of Superintendent.” (14 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

**2033-80-R:** Canadian Union of Public Employees (Applicant) v. Canadian Infa-Care Ltd. (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor.” (13 employees in the unit). (*Having regard to the agreement of the parties*).

**2047-80-R:** United Brotherhood of Carpenters and Joiners of America Drywall Acoustic and Lathing and Insulation, Local 675 (Applicant) v. Maple Drywall & General Contract (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working formen." (7 employees in the unit).

**2048-80-R:** United Steelworkers of America (Applicant) v. International Tobacco Wholesale Alliance Limited (Respondent).

Unit: "all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff." (15 employees in the unit). (*Having regard to the agreement of the parties*).

**2049-80-R:** United Steelworkers of America (Applicant) v. West Bend of Canada, Division of Dart Industries Canada Limited (Respondent).

Unit: "all employees of the respondent in Mississauga save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (8 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

**2050-80-R:** United Steelworkers of America (Applicant) v. West Bend of Canada, Division of Dart Industries Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Brampton save and except foremen, persons above the rank of foreman, office, sales and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (32 employees in the unit.) (*Having regard to the agreement of the parties*). (*clarity note*).

**2057-80-R:** United Steelworkers of America (Applicant) v. L & P Suppliers Limited (Respondent).

Unit: "all employees of L & P Suppliers Limited in Markham Township, save and except foreman, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (8 employees in the unit). (*Having regard to the agreement of the parties*).

**2059-80-R:** Canadian Union of Public Employees (Applicant) v. The Parking Authority of the City of Belleville (Respondent).

Unit: "all employees of the respondent working in the Belleville Parking Authority of the Corporation of the City of Belleville, Ontario, save and except the manager, those above the position of manager and those employees covered by the subsisting collective agreements with the Canadian Union of Public Employees and its Local 140 and the Canadian Union of Public Employees and its Local 907." (17 employees in the unit). (*Having regard to the agreement of the parties*).

**2064-80-R:** International Union of Operating Engineers Local 772 (Applicant) v. Zymaze Company (Respondent).

Unit: "all employees of the respondent employed as stationery engineers at London, Ontario, save and except the Chief Engineer and persons above the rank of Chief Engineer." (5 employees in the unit). (*Having regard to the agreement of the parties*).

**2066-80-R:** Graphic Arts International Union, Local 28-B (Applicant) v. The Carswell Printing Company (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except working foremen, persons above the rank of working foreman, office and sales staff, persons employed in the creative department, employees covered by subsisting collective agreements, persons regularly employed for not

more than twenty-four hours per week, and students employed during the school vacation period.” (8 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

**2078-80-R:** Canadian Union of Public Employees (Applicant) v. Hillcrest Christian Church (Disciples) (Respondent).

Unit: “all day care employees of the respondent in Toronto, save and except the supervisor and persons above that rank.” (6 employees in the unit).

**2080-80-R:** Ontario Public Service Employees Union (Applicant) v. St. Mary’s General Hospital (Respondent).

Unit #1: “all lay employees of the respondent in Timmins, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, office and clerical staff, chief engineer, paramedical and technical personnel, supervisors, foremen, persons above the rank of supervisor and foreman, persons covered by subsisting collective agreements and certificates, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (121 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all lay employees of the respondent in Timmins, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, office and clerical staff, chief engineer, paramedical and technical personnel, supervisors, foremen, persons above the rank of supervisor and foreman, and persons covered by subsisting collective agreements and certificates.” (52 employees in the unit). (*Having regard to the agreement of the parties*).

**2088-80-R:** Ontario Brotherhood of Carpenters and Joiners of America, Drywall, Acoustic Lathing and Insulation, Local 675 (Applicant) v. Kristensen Drywall Inc. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**2104-80-R:** Sudbury Mine Mill & Smelter Workers Union, Local 596 (Applicant) v. Fagersta Limited (Respondent).

Unit: “all employees of the respondent employed under service contract in the Mining Industry in the Regional Municipality of Sudbury, save and except foremen and shift bosses, persons above the rank of foreman and shift boss, engineers, office and sales staff.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

**2107-80-R:** International Brotherhood of Painters and Allied Trades — Local Union 1891 (Applicant) v. Maple Drywall (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*clarity note*).

**2134-80-R:** The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494; 1007; 1410; 1425; 1592; 1669; 1916 and 2309 (Applicant) v. Abicon Ltd. (Respondent).



Unit: “all millwrights and millwrights’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all millwright and millwrights’ apprentices in the employ of the respondent in all other sectors in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**2157-80-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Derek Cowell & Associates Inc. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**2170-80-R:** United Brotherhood of Carpenters and Joiners of America, Drywall, Acoustic Lathing and Insulation, Local 675 (Applicant) v. Weston Drywall Ltd. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**2177-80-R:** International Brotherhood of Painters and Allied Trades — Local Union 1891 (Applicant) v. Delta Drywall Limited (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*clarity note*).

**2186-80-R:** United Brotherhood of Carpenters and Joiners of America, Drywall, Acoustic Lathing and Insulation, Local 675 (Applicant) v. Delta Drywall Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

### Applications Certified Subsequent to a Pre-Hearing Vote

**1721-80-R:** Canadian Union of Public Employees (Applicant) v. Rygiel Home (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Hamilton-Wentworth, save and except supervisors and those above the rank of supervisor.” (137 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list	134
Number of persons who cast ballots	121
Number of ballots marked in favour of applicant	62
Number of ballots marked against applicant	59

**1722-80-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Residence Saint-Louis (Respondent) v. Le Syndicat de Employees de Services Publics d'Orleans (CSN) (Incumbent Trade Union).

Unit: "all lay employees of the respondent in Orleans, Ontario, save and except professional medical staff, registered and graduate nurses, registered nursing assistants, professional staff, technical personnel, office and clerical staff, supervisors, foremen, persons above the rank of foreman, plant manager and assistant plant manager." (98 employees in the unit). (*Having regard to the agreement of the applicant and the respondent*).

Number of names of persons on list as originally prepared by employer		96
Number of persons who cast ballots	69	
Number of ballots marked in favour of applicant	46	
Number of ballots marked in favour of intervener	15	
Ballots segregated and not counted	8	

**1920-80-R:** Canadian Union of Operating Engineers and General Workers (Applicant) v. The Smith Falls Community Hospital — North Unit (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: "all stationary engineers and those persons primarily engaged as their helpers employed by the respondent save and except chief engineer, and those above the rank of chief engineers employed by The Smith Falls Community Hospital North Unit, Lanark County, Smith Falls, Ontario." (5 employees in the unit).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant	5	
Number of ballots marked in favour of intervener	0	

**1992-80-R:** Energy and Chemical Workers Union (Applicant) v. Ralston Purina Canada Inc. Grocery Products Division (Respondent) v. American Federation of Grain Millers (Intervener #1) v. Teamsters Local Union No. 419 (Intervener #2).

Unit: "all production and maintenance employees of the respondent at the Clarkson Plant, save and except foremen, those above the rank of foreman, office and sales staff, and stationary engineers." (173 employees in the unit).

Number of persons on voters' list at start of vote		172
Number of persons who cast ballots	145	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	136	
Number of ballots marked in favour of intervener	8	

## Applications Certified Subsequent to a Post-Hearing Vote

**1119-80-R:** Hotel, Restaurant and Cafeteria Employees' Union, Local 75, Toronto, of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.I.O.-C.L.C.) (Applicant) v. Diana Sweets Ltd. (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent at Scarborough Town Centre, save and except head chef, host(ess), those above the rank of head chef and host(ess), office staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (34 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of persons on revised voters' list		33
Number of persons who cast ballots	30	
Number of ballots marked in favour of applicant	18	
Number of ballots marked against applicant	11	
Ballots segregated and not counted	1	

*(Bargaining Unit #2 — See Applications Certified — No Vote Conducted).*

**1557-80-R:** International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. 437412 Ontario Limited, Known as: Sammy's Exchange Restaurant (Respondent).

Unit: "all full-time and part-time male and female bartenders, tapman, bar boys, improvers and waiters in the employ of the respondent at Sammy's Exchange Restaurant at the Toronto-Dominion Centre, save and except assistant manager and persons above the rank of assistant manager." (51 employees in the unit).

Number of names of person on list as originally prepared by employer		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	2	

**1870-80-R:** United Plant Guard Workes of America, Local 1962 (Applicant) v. McDonnell Douglas Canada Ltd. (Respondent).

Unit: "all security officers employed by the company in Mississauga, Ontario, save and except sergeants/supervisors and persons above the rank of sergeant/supervisor." (26 employees in the unit). *(Having regard to the agreement of the parties).*

Number of names of persons on revised voters' list		27
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant	18	
Number of ballots marked in favour of intervener	0	

**1929-80-R:** United Steelworkers of America (Applicant) v. Parmenter & Bulloch Division of Textron Canada Limited (Respondent) v. Local 216 National Council of Canadian Labour (Intervener).

Unit: "all employees at the respondent's plant in Gananoque, save and except foremen, persons above the rank of foreman, office employees, sales employees, technical personnel, plant guards, and persons not regularly employed for more than twenty-four (24) hours in any calendar week." (62 employees in the unit).

Number of names of persons on list as originally prepared by employer		62
Number of names of persons on revised voters' list		61
Number of persons who cast ballots	60	
Number of ballots marked in favour of applicant	39	
Number of ballots marked in favour of intervener	21	



## APPLICATIONS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**0784-80-R:** Local 966, Amalgamated Transit Union (Applicant) v. The Corporation of the City of Thunder Bay (Respondent) v. Group of Employees (Objectors).

**0835-80-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Mastangelo Construction (Respondent) v. General Contractors' Section of the Toronto Construction Association (Intervener).

**1044-80-R:** Sheet Metal Workers, International Association Local Union 537 (Applicant) v. Braneida Mechanical Service Ltd. (Respondent).

**1584-80-R:** International Union of Operating Engineers, Local 793 (Applicant) v. C.A. Sexton Limited (Respondent) v. Group of Employees (Objectors).

**1935-80-R:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Buttcon Limited (Respondent).

**1949-80-R:** Canadian Union of Public Employees (Applicant) v. St. Joseph's General Hospital (Respondent).

**1973-80-R:** United Food and Commercial Workers International Union A.F.L., C.I.O., C.L.C. (Applicant) v. Mullers Meats Limited (Respondent) v. Group of Employees (Objectors).

**2058-80-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Belleville (Respondent).

### Certifications Dismissed Subsequent to a Pre-Hearing Vote

**2003-79-R:** Ontario Public Service Employees Union (Applicant) v. Board of Education for the Borough of Scarborough (Respondent) v. Canadian Union of Public Employees (Intervener #1) v. Glen Purcell (Intervener #2) v. Scarborough Educational Staff Association (Intervener #3).

Unit: "all office, clerical, technical employees, teacher aides, and cafeteria aides of the Board of Education for the Borough of Scarborough, save and except supervisors, persons above the rank of supervisors, persons regularly employed for not more than twenty-four (24) hours per week, students, and those employed in positions set out in Appendix "A"." (679 employees in the unit).

Number of names of persons on revised voters' list	682
Number of persons who cast ballots	691
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	263
Number of ballots marked against the applicant	349
Ballots segregated and not counted	76

**1774-80-R:** Association of Allied Health Professionals: Ontario (Applicant) v. Mount Sinai Hospital (Respondent) v. Ontario Public Service Employees Union (Intervener).

Unit: "all paramedical personnel employed by the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, students-in-training,

interns, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (158 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on revised voters' list		175
Number of persons who cast ballots		154
Number of ballots marked in favour of applicant	70	
Number of ballots marked against applicant	77	
Ballots segregated and not counted	7	

### Certifications Dismissed Subsequent to a Post-Hearing Vote

**0150-79-R; 0153-79-R:** Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 (Applicant) v. Fuller's Restaurant (Respondent) v. Group of Employees (Objectors).

Unit: #1: "all employees of the respondent working at 809 Richmond Road, Ottawa, Ontario, save and except assistant managers, management trainees, kitchen managers and persons above those ranks, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (14 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally Prepared by employer		30
Number of persons who cast ballots		22
Number of ballots marked in favour of the applicant	0	
Number of ballots marked against the applicant	21	
Ballots segregated and not counted	1	

(*Bargaining Unit #2 — See Certifications, No Vote Conducted*).

**0011-80-R:** The United Brotherhood of Steeplejacks and Allied Trades of Canada (Applicant) v. Maxim Restoration Ltd. (Respondent) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Restoration Steeplejacks Local Union No. 172 (Intervener).

Unit: "all employees of the respondent in the Province of Ontario, save and except non-working foremen and those above the rank of non-working foreman, engaged in steeplejack and masonry restoration work." (13 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on revised voters' list		18
Number of persons who cast ballots		17
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of intervener	12	

**0012-80-R:** The United Brotherhood of Steeplejacks and Allied Trades of Canada (Applicant) v. Neath Toronto Ltd. (Respondent) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Restoration Steeplejacks Local Union No. 172 (Intervener).

Unit: "all employees of the respondent in the Province of Ontario, save and except non-working foremen and those above the rank of non-working foreman, engaged in steeplejack and masonry restoration work." (11 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	25
Number of ballots marked in favour of applicant	12
Number of ballots marked in favour of intervener	13

**0013-80-R:** The United Brotherhood of Steeplejacks and Allied Trades of Canada (Applicant) v. The B. Phillips Company Limited (Respondent) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Restoration Steeplejacks Local Union Un. 172 (Intervener #1) v. The International Union of Bricklayers and Allied Craftsmen The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Intervener #2) v. Toronto-Central Ontario Building and Construction Trades Council (Intervener #3) v. The Carpenters' District Council of Toronto and Vicinity of behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227 and 3233 of the United Brotherhood of Carpenters and Joiners of America (Intervener #4) v. Labourers' Union Local 506 (Intervener #5).

Unit: "all employees of the respondent in the Province of Ontario, save and except non-working foremen and those above the rank of non-working foreman, engaged in steeplejack and masonry restoration work." (5 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener #1	8

**0015-80-R:** The United Brotherhood of Steeplejacks and Allied Trades of Canada (Applicant) v. Swing Stage Limited (Respondent) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Restoration Steeplejacks Local Union No. 172 (Intervener).

Unit: "all employees of the respondent employed in its plant in Metropolitan Toronto, and on its job sites in the Province of Ontario, save and except non-working foremen, those above the rank of non-working foreman, sales and engineering staff and office staff." (39 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	43
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	34

**0027-80-R:** The United Brotherhood of Steeplejacks and Allied Trades of Canada (Applicant) v. Malcolm Isbister & Co. Ltd. (Respondent) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Restoration Steeplejacks Local Union No. 172 (Intervener).

Unit: "all employees of the respondent in the Province of Ontario, save and except non-working foremen and those above the rank of non-working foreman, engaged in steeplejack and masonry restoration work." (3 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	6



**1805-80-R:** Canadian Union of Public Employees (Applicant) v. United Counties of Prescott-Russell (Respondent) v. Group of Employees (Objectors).

Unit: "all persons employed within the Roads Department of the respondent in the United Counties of Prescott and Russell save and except foremen, persons above the rank of doreman, office and clerical staff, and students employed during the school vacation period." (29 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		27
Number of persons who cast ballots	27	
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	16	

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0021-80-R:** Ready-Mix, Building Supply, Hydro, Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Oshawa Paving (Respondent).

**0598-80-R:** International Union of Operating Engineers, Local 793 (Applicant) v. E & E Seegmiller Limited (Respondent).

**1817-80-R:** United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, Local 675 (Applicant) v. Wenzel Drywall Ltd. (Respondent).

**1883-80-R:** Association of Commercial and Technical Employees 1704 Canadian Labour Congress (Applicant) v. American Can Canada Ltd. (Respondent).

**1928-80-R:** Canadian Brotherhood of Railway, Transport and General Workers, Local 270 (Applicant) v. Ottawa Civil Service Recreational Association (Respondent) v. Group of Employees (Objectors).

**2046-80-R:** The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Local 494; 1007; 1410; 1425; 1592; 1916 and 2309 (Applicant) v. Abicon Ltd. (Respondent).

**2063-80-R:** The Canadian Union of Public Employees (Applicant) v. The Adelaide Cleaning Company (Respondent).

**2089-80-R:** Brotherhood of Railway, Airline & Steamship Clerks Freight Handlers, Express & Station Employees (Applicant) v. Airtours Ltd. (Respondent).

**2163-80-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Blair Supply Company Limited (Respondent) v. Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Intervener).

## APPLICATIONS UNDER SECTION 1(4)

**1463-80-R:** Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. B.R. Rousseau Plumbing and Heating Limited and 446073 Ontario Inc. T/A Rousseau Plumbing and Heating (Respondents). (*Dismissed*).

**1579-80-R:** United Brotherhood of Carpenters and Joiners of America, Local 249 and Carpenters' District Council of Lake Ontario on behalf of Locals 397, 572, 1071 and 1450 of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Hugh Murray (1974) Limited; and Trend Building Systems, owned and operated by 444758 Ontario Inc. (Respondents). (*Granted*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1605-80-R:** Allan A. Daley (Applicant) v. Toronto Typographical Union No. 91 (I.T.U.) (Respondent). (13 employees). (*Granted*).

**1939-80-R:** Joseph R. Wells (Applicant) v. Toronto Printing Pressmen & Assistants' Union No. 10 (Respondent) v. Kohl & Madden Printing Ink Company (Intervener). (4 employees). (*Granted*).

**2034-80-R; 2035-80-R:** Alexandra Hospital (Applicant) v. Service Employees International Union, Local 220 (Respondent). (3 employees). (*Granted*).

**2039-80-R:** Pat Cowan (Applicant) v. Teamsters Local Union 419 (Respondent) v. The Toronto Resource Recovery District of Browning — Ferris Industries Ltd. (Intervener). (*Withdrawn*). (27 employers).

## APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

**1509-80-R:** Ottawa Typographical Union, Local 102 (Applicant) v. The Citizen a division of Southam Inc. (Respondent). (*Granted*).

**1668-80-R:** Teamsters Local Union No. 1247 Chemical, Energy and Allied Workers, chartered by International Brotherhood of Teamsters, Chaufferus, Warehousemen and Helpers of America (Applicant) v. Victory Soya Mills, Limited (Respondent). (*Granted*).

**1750-80-R:** The North York Civic Employees' Union, Local 94, Canadian Union of Public Employees (Applicant) v. The Corporation of the City of North York (Respondent). (*Granted*).

**1858-80-R:** Energy and Chemical Workers Union (Applicant) v. Genstar Chemical Limited (Respondent). (*Granted*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**1172-80-U:** The Amalgamated Transit Union, Local 1573 (Applicant) v. The Corporation of the City of Brampton C.H. Prentice and R. Gourley (Respondents). (*Denied*).

**1275-80-U; 1276-80-U; 2055-80-U:** International Ladies' Garment Workers' Union (Applicant) v. Newport Sportswear Limited (Respondent). (*Granted*).

**1354-80-R:** Ontario Public Service Employees Union (Applicant) v. R.B. McAusland W.G. Docherty, G.M. Zybyk and St. Clair College of Applied Arts & Technology (Respondents). (*Dismissed*).

**1925-80-U:** United Food and Commercial Workers International Union A.F.L., C.I.O., C.I.C. (Applicant) v. Mullers Meats Limited (Respondent). (*Withdrawn*).

**2055-80-U:** International Ladies' Garment Workers' Union (Applicant) v. Newport Sportswear Limited (Respondent). (*Granted*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**0853-79-U:** Sarnia, Ontario, Canada Building and Construction Trades Council, on behalf of its constituent members, save and except International Brotherhood of Boilermakers, Iron, Shipbuilders, Blacksmiths, Forgers and Helpers, Local Union No. 128 (Complainant) v. International Brotherhood of Boilermakers, Iron, Shipbuilders, Blacksmiths, Forgers and Helpers and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and Ins-Co Sarnia Ltd. and John MacManus and Marcel T. Beauchamp (Respondents). (*Terminated*).

**1704-79-R; 0764-80-U:** Service Employees' International Union, Local 183 (Applicant) v. K-Mart Canada Limited (Peterborough) (Respondent) v. Group of Employees (Objectors). (*Granted*).

**2468-79-U:** Michaël K. Demizio (Complainant) v. International Molders & Allied Workers Union Local 29 (Respondent) v. Galtaco Inc. (Intervener). (*Dismissed*).

**0082-80-U:** Cliff Wilson (Complainant) v. United Brotherhood of Carpenters and Joiners of America and Local Union 2737 (Respondent). (*Terminated*).

**1050-80-U:** International Union of Operating Engineers, Local 793 (Complainant) v. Hulst Town Contracting Ltd. and Fred Picavet (Respondent). (*Withdrawn*).

**1056-80-U:** Peter George (Complainant) v. United Steelworkers of America Local 2859 and Babcock Wilcox Canada Ltd. (Respondent). (*Withdrawn*).

**1169-80-U:** Service Employees Union, Local 204 (Complainant) v. The Villa Private Hospital (Respondent). (*Terminated*).

**1170-80-U:** The Amalgamated Transit Union, Local 204 (Complainant) v. The Corporation of the City of Brampton (Brampton Transit) (Respondent). (*Granted*).

**1224-80-U:** Ontario Public Service Employees Union (Complainant) v. Cybermedix (Respondent). (*Granted*).

**1275-80-U; 1276-80-U; 2055-80-U:** International Ladies' Garment Workers' Union (Applicant) v. Newport Sportswear Limited (Respondent). (*Granted*).

**1287-80-U:** Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Gateway Delivery System of North Bay Ltd. (Respondent). (*Withdrawn*).



**1460-80-U:** Service Employees International Union, Local 204 (Complainant) v. Heritage Nursing Home Limited (Respondent). (*Dismissed*).

**1466-80-U:** London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. The Corporation of the City of St. Thomas and Beaver Foods Limited (Respondents). (*Dismissed*).

**1524-80-U:** United Steelworkers of America (Complainant) v. Sling Choker Manufacturing Ltd. (Respondent). (*Granted*).

**1570-80-U; 1571-80-U:** Labourers' International Union of North America, Local 183 (Complainant) v. Peel Condominium Corporation 112 Barbara J. Smith, Ray Rahman and Perscel Management Limited (Respondents). (*Withdrawn*).

**1647-80-U:** Guelph Typographical Union Local 391 (ITU) (Complainant) v. The Guelph Daily Mercury (Respondent). (*Dismissed*).

**1657-80-U:** Daisy Daley (Complainant) v. CNTU-CSN Confederation des Syndicats Nationaux (Respondent). (*Withdrawn*).

**1698-80-U:** United Steelworkers of America (Complainant) v. Sling Choker Manufacturing Ltd. (Respondent). (*Dismissed*).

**1806-80-U:** Robert Ernest Kemp (Complainant) v. United Auto Workers International Union, Dennis Tyce — Representative (Respondents). (*Withdrawn*).

**1861-80-U:** Robert Wygiera (Complainant) v. Canadian Transportation (Respondent). (*Dismissed*).

**1864-80-U:** Raphael Ismond (Complainant) v. Simpson Plant Council (Respondent). (*Dismissed*).

**1865-80-U:** Joseph V. Whitehouse (Complainant) v. Labourers International Union of North America, Oil & Gas Technicians Service Domestic General Workers Union, Local 1267 (Respondent). (*Withdrawn*).

**1879-80-U:** Ontario Public Service Employees Union (Complainant) v. The Ontario Metis and Non-Status Indian Association (Respondent). (*Withdrawn*).

**1894-80-U:** Florence M. Casey (Applicant) v. (1) Ontario Secondary School Teachers Federation (Sault Ste. Marie Division) and (2) Ontario Secondary School Teachers Federation (Respondents). (*Dismissed*).

**1910-80-U:** Canadian Paperworkers' Union (Complainant) v. Standard Paper Box Inc. (Respondent). (*Withdraw*).

**1915-80-U:** Teamsters Local Union No. 132, Chemical, Energy and Allied Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Chempac, Division of C.C.L. Industries (Respondent). (*Withdrawn*).

**1917-80-U:** Teamseters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Adidas (Canada) Limited (Respondent). (*Withdrawn*).

**1918-80-U:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Adidas (Canada) Limited (Respondent). (*Withdrawn*).

**1963-80-U:** Canadian Union of Operating Engineers and General Workers (Complainant) v. Queensway Carleton Hospital (Respondent). (*Withdrawn*).

**1969-80-U:** International Association of Machinists and Aerospace Workers (Complainant) v. General Equipment Manufacturing Limited (Respondent). (*Withdrawn*).

**1979-80-U:** Frank Truderung (Complainant) v. Lumber & Sawmill Workers Union Local 2693 (Respondent). (*Dismissed*).

**1980-80-U:** United Food & Commercial Workers International Union A.F.L., C.I.O., C.L.C. (Complainant) v. Mullers Meats Limited (Respondent). (*Withdrawn*).

**1981-80-U:** United Food & Commercial Workers International Union A.F.L., C.I.O., C.L.C. (Complainant) v. Mullers Meats Limited (Respondent). (*Withdrawn*).

**1982-80-U:** Ken Regnier (Complainant) v. Mr. Peter Belanger — Presiding Plant Chairman of Local Union 1941 of the United Automobile Aerospace and Agricultural Implement Workers of America — U.A.W. (Respondent). (*Withdrawn*).

**1996-80-U:** United Steelworkers of America (Complainant) v. Northway Industries of Balfour Ltd. (Respondent). (*Terminated*).

**2003-80-U:** Teamsters Local Union No. 990, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. V & T Trucking Ltd. (Respondent). (*Withdraw*).

**2009-80-U:** Ron Dodouch (Complainant) v. Silverwood Dairies Management of Toronto, Head of the Dairy Mr. R. Duffy (Respondent). (*Withdrawn*).

**2010-80-U:** United Food & Commercial Workers International Union, A.F.L., C.I.O., C.L.C. (Complainant) v. Mullers Meats Limited (Respondent). (*Withdrawn*).

**2019-80-U:** Margaret Beemer (Complainant) v. The Wheels Inn and John Bradley and Robert Bradley and William J. Mader (Respondents). (*Withdrawn*).

**2022-80-U:** Anthony Merci (Complainant) v. Local 419 Teamsters (Respondent) v. Industrial Disposal, Division of Valeria Holdings Ltd. and Waste Management Inc. of Canada (Employer). (*Dismissed*).

**2010-80-U:** United Food & Commercial Workers International Union, A.F.L., C.I.O., C.L.C. (Complainant) v. Mullers Meats Limited (Respondent). (*Withdrawn*).

**2019-80-U:** Margaret Beemer (Complainant) v. The Wheels Inn and John Bradley and Robert Bradley and William J. Mader (Respondents). (*Withdrawn*).

**2022-80-U:** Anthony Macri (Complainant) v. Local 419 Teamsters (Respondent) v. Industrial Disposal, Division of Valeria Holdings Ltd. and Waste Management Inc. of Canada (Employer). (*Dismissed*).

**2027-80-U:** Teamsters Local Union No. 990, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. V & T Trucking Ltd. (Respondent). (*Withdrawn*).

**2030-80-U:** United Steelworkers of America (Complainant) v. The Irwin Group (Respondent). (*Withdrawn*).

**2038-80-U:** United Food and Commercial Workers (Complainant) v. Chocolate Products Company Limited (Respondent). (*Withdrawn*).

**2042-80-U:** Canadian Union of Industrial Employees (Complainant) v. Anderson Metal Industries Inc. (Respondent). (Respondent). (*Withdraw*).

**2053 – 80 – U:** Dorothy Ann Howells (Complainant) v. Association of Commercial and Technical Employees Local 1703 - C.L.C. (Respondent). (*Withdrawn*).

**2072 – 80 – U:** Pierrette F. Cote (Applicant) v. Local 582 Retail-Wholesale & Dept Store Union Representative Gloria Lay & Garry McDonald, Manager of Charterways (Respondents). (*Withdrawn*).

**2075-80-U:** United Food & Commercial Workers International Union, A.F.L., C.I.O., C.L.C. (Complainant) v. Mullers Meat Limited (Respondent). (*Withdrawn*).

**2110-80-U:** John A. Buozi (Complainant) v. City of Toronto (Parks and Recreation) (Respondent). (*Withdrawn*).

**2124-8-U:** Hourly Employees – Sherwood Farms, Niagara Falls, Ont. (Complainants) v. Ontario Poultry and Dairy Allied Workers, Local P-1105 (Respondent). (*Withdrawn*).

**2189-80-U:** Ronald E. Gravelle (Complainant) v. Ken Martin, Local 593 London (Respondent). (*Withdrawn*).

**2191-80-U:** Office and Professional Employees Internatinal Union (Complainant) v. Keen Community Credit Union Limited (Respondent). (*Withdrawn*).

**2204-80-U:** Ontario Public Service Employees Union (Complainant) v. The Ontario Metis and Non-Status Indian Association (Respondent). (*Withdrawn*).

**2205-80-U:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Burgess Wholesale (1978) Limited (Respondent). (*Withdrawn*).

**2212-80-U:** Mary Johnson and Others (Complainants) v. Canadian Labour Congree Representatives Union (Respondent). (*Withdrawn*).

**2217-80-U:** Canadian Union of Public Employees (Complainant) v. United Counties of Prescott & Russell (Respondent). (*Withdrawn*).

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**2014-80-M:** Inmont Canada Limited (Applicant) v. Printing Specialties and Paper Products Union, Local 466 (Respondent). (*Granted*).



## APPLICATIONS UNDER SECTION 55

**1235-80-R:** Office and Professional Employees International Union, Local 131 (Applicant) v. Silverwood Dairies, a Division of Silverwood Industries Limited and The Borden Company, Limited (Respondents) v. Retail, Wholesale, Dairy and General Workers' Union, Local 440, of the Retail, Wholesale and Department Store Union, AFL: CIO: CLC (Intervener). (*Granted*).

**1860-80-R:** The Sheet Metal Workers' International Association Local Union 285 (Applicant) v. S. & S. Sheet Metal Co. and M. & W. Sheet Metal and Rennie Sheet Metal Limited (Respondents). (*Terminated*).

## APPLICATIONS UNDER THE COLLEGES COLLECTIVE BARGAINING ACT 1975, SECTION 78

**0139-80-U:** Ontario Public Service Employees Union (Complainant) v. The Board of Governors of The Fanshawe College of Applied Arts and Technology, J. A. Colvin and W. Collard (Respondents). (*Dismissed*).

## JURISDICTIONAL DISPUTES

**0658-80-JD:** Doef's Ironworks Ltd. (Complainant) v. International Brotherhood of Boilermakers Iron Ship Builders Blacksmiths Forgers & Helpers, International Brotherhood of Boilermakers Iron Ship Builders Blacksmiths Forgers and Helpers, Local 128, and International Association of Bridge, Structural, Ornamental & Ironworkers, Local 721 (Respondents). (*Withdrawn*).

## APPLICATIONS UNDER THE COLLEGES COLLECTIVE BARGAINING ACT 1975, SECTION 82

**2174-80-U:** Ajax and Pickering General Hospital and the other Hospitals set out in Appendix "A" attached (Applicants) v. William Brown, Gilles LeBel, Catharine McQuarrie Grace Hartman, Lucy Nicholson, Patrick O'Keeffe, Jim Grant, Uli Venohr, Pat Kenny, Paul Berry, Gerald Jones, Michael Deveault and M. Borduas, and Canadian Union of Public Employees and its Local Unions set out in Appendix "B" attached (Respondents). (*Granted*).

**2288-80-U:** Norfolk Communications Ltd. (Applicant) v. The Directors Guild of Canada, Robert Barclay et al. (Respondents). (*Withdrawn*).

## APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

**0749-80-M:** London and District Service Workers' Union, Local 220 (Applicant) v. Sunbeam Home (Respondent). (*Granted*).

**0927-80-M:** Kingston Technicians Union, L. 254 (Applicant) v. Queen's University (Respondent). (*Withdrawn*).

**1602-80-M:** Canadian Union of Public Employees Local 218 (Applicant) v. Durham Region Roman Catholic Separate School Board (Respondent). (*Terminated*).

**1624-80-M:** The Association of Allied Health Professionals: Ontario (Applicant) v. Kingston General Hospital (Respondent). (*Withdrawn*).

**1638-80-M:** Ontario Teamsters Credit Union Limited (Employer) v. Office & Professional Employees International Union (Trade Union). (*Withdrawn*).

**1839-80-M:** Service Employees Union, Local 204 (Applicant) v. Welland County General Hospital (Respondent). (*Terminated*).

## APPLICATIONS FOR DETERMINATION UNDER SECTION 96

**2452-79-M:** Village Inn (Employer) v. Hotel and Club Employees' Union, Local 299 (Trade Union). (*Terminated*).

## APPLICATIONS UNDER SECTION 112a

**0852-79-M:** The Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers Local Unions 700, 721, 736, 759, 765 and 786 (Applicant) v. The Ontario Erectors Association and Ins-Co Sarnia Ltd. (Respondents). (*Terminated*).

**2295-79-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Master Insulation Company Limited (Respondent). (*Granted*).

**1298-80-M:** International Union of Elevator Constructors, Local 50 (Applicant) v. Montgomery Elevator Company Limited and National Elevator & Escalator Association (Respondents). (*Withdrawn*).

**1408-80-M:** The Residential Low-Rise Forming Contractors Association of Metropolitan Toronto and Vicinity (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Teskey Construction Co Ltd. (Intervener). (*Dismissed*).

**1467-80-M:** The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industr of the United States and Canada and Local Union 71 of the Council (Applicant) v. Eastern Sheet Metal and Mechanical Contractors (Respondent) v. Mechanical Contractors Association of Ottawa (Intervener #1) v. Mechanical Contractors Association of Ontario (Intervener #2). (*Granted*)

**1606-80-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Midwestern Contracting Limited (Respondent). (*Granted*).

**1708-80-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Art Busse Ltd. and Art Busse Associates (Kenora) Ltd. (Respondents). (*Granted*).

**1852-80-M:** Labourers' International Union of North America, Local 1036 (Applicant) v. Pitts Engineering Construction Ltd. (Respondent). (*Withdrawn*).

**1852-80-M:** Labourers' International Union of North America, Local 1059 (Applicant) v. John Hayman and Sons Co Ltd. (Respondent). (*Withdrawn*).

**1944-80-M:** United Brotherhood of Carpenters and Joiners of America Local Union 1669 and the Ontario Provincial Council of Carpenters (Applicant) v. Tilechem Limited (Respondent). (*Withdrawn*).

**1956-80-M:** Labourers' International Union of North America, Local Union 493 (Applicant) v. A. Buttazoni & Son Limited (Respondent). (*Withdrawn*).

**1957-80-M:** Labourers' International Union of North America, Local Union 493 (Applicant) v. A. Buttazoni & Son Limited (Respondent). (*Withdrawn*).

**1958-80-M:** Labourers' International Union of North America, Local Union 493 (Applicant) v. A. Buttazoni & Son Limited (Respondent). (*Withdrawn*).

**1974-80-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Newman Bros. Co. Ltd. (Respondent). (*Withdrawn*).

**2077-80-M:** United Brotherhood of Carpenters and Joiners of America, Local 675 and the Ontario Acoustical and Drywall District Council (Applicant) v. Regional Acoustic and Drywall Ontario Ltd. (Respondent). (*Withdrawn*).

**2082-80-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 1133, 1747, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Appeal Contractors Ltd. (Respondent). (*Withdrawn*).

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**2086-80-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. C E Canada (Respondent). (*Withdrawn*).

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Ontario  
Labour Relations  
Board

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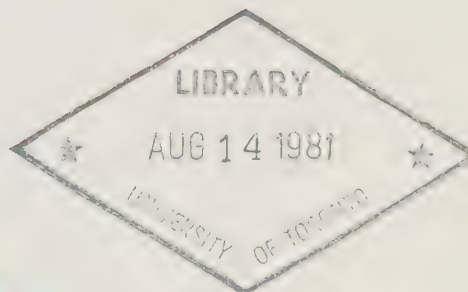
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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1981] OLRB REP. MAR.**

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## ERRATUM

### K-Mart Canada Limited (Peterborough)

[1981] OLRB Rep. Jan. 60.

Page 90, line 2 of paragraph 1 in Board Member J. D. Bell's decision - For "objectives" read "adjectives".

That paragraph should read as follows:

"1. I agree the company did commit certain unfair labour practices. However I do not wish to be associated with many of the adjectives used, the obiter quoted, nor many of the inferences arrived at in the majority decision."

## **NOTICE OF NEW PRACTICE NOTE**

**PRACTICE NOTE NUMBER 14**

**March 24, 1981**

**ADJOURNMENT SINE DIE**

In all cases where parties have agreed to adjourn a matter before the Board to an unspecified date, the Board shall endorse its record stating that the matter has been adjourned *sine die*. In such cases, the Board will deem the application or complaint withdrawn at the expiry of one year from the date upon which the adjournment *sine die* was granted and the Board's record will be endorsed accordingly without further notice to the parties, provided that within that period of time a party has not requested that the Board schedule the matter for further hearing.





**1644-80-R** United Brotherhood of Steeplejacks and Allied Trades of Canada, Applicant, v. **A. N. Shaw Restoration Ltd.**, Respondent, v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local Union No. 172 Restoration Steeplejacks, Intervener, v. Group of Employees, Objectors.

**Construction Industry – Bargaining Unit – Non-craft union seeking bargaining rights for one of several divisions of construction industry employer – Board's bargaining unit policy where non-craft union's organizing construction industry discussed**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members H. J. F. Ade and H. Kobryn.

**APPEARANCES:** *James Fyshe, Margaret Truesdale and Joe Petricevic for the applicant; Paula M. Rusak and Roger Neath for the respondent; Edward A. Bartley and Arthur Enman for the intervener; Joe Chaves for the objectors.*

#### **DECISION OF THE BOARD;** March 2, 1981

1. This is an application for certification in which the applicant requested a pre-hearing vote. The vote has now been held and the ballot box sealed at the direction of the Board.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of *The Labour Relations Act*.

3. The essential dispute in this case is over the description of an appropriate bargaining unit. The respondent has three divisions through which it carries on business in the construction industry. These are the masonry division, which is its largest, plus two recently-acquired divisions, the flooring division and the roofing division. The masonry division has for a number of years been represented by The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local Union No. 172 Restoration Steeplejacks, and the applicant in another application before the Board (Board File No. 0014-80-R) is seeking to displace the Plasterers' as the bargaining agent. The applicant in the present application seeks bargaining rights only for the flooring division of the respondent. The respondent, on the other hand, since the application relates to the construction industry, takes the position that the bargaining unit ought to be described in the Board's usual terms of all trades employed by the respondent in Board Area 8 on the date of the application. The Board in File No. 0014-80-R determined that the applicant is not a trade union within the meaning of the construction provisions of *The Labour Relations Act*, and accordingly the present application is brought under the general provisions of the Act. The applicant argues that that being the case, there is nothing in *The Labour Relations Act* or Board policy restricting the description of the unit to all trades employed on the date of the application. Rather, the applicant takes the position that the issue is simply: what is an appropriate bargaining unit within the meaning of section 6(1) of the Act?

4. The evidence discloses that all three divisions of the respondent are administered and deployed out of a common location and common office. There is a single Sales Manager

and a single Contract Manager. Each division has its own Director, however, as well as field supervisors, although neither the roofing nor flooring division employ field supervisors on a full-time basis. All field supervisors report not to their Divisional Director, but to the Contract Manager. Many of the roofing or flooring contracts are obtained in conjunction with one another, although the work is not generally performed by the two divisions at the same time. The roofing work requires different tools and training from the flooring work. There are, however, varying degrees of unskilled work involved in both divisions, and employees from the flooring division can be assigned from time to time to assist on roofing jobs, when there are insufficient roofers available. In addition, employees in the flooring division are frequently offered work on a temporary basis in the roofing division when there is a shortage of work in the flooring division, in order to avoid such employees having to be laid off. Employees applying for jobs with the respondent may be referred to one or the other of the divisions, depending on the employee's own preference and the need for additional men.

5. As a matter of approach, the Board agrees with the proposition put forward by counsel for the applicant; that is, the issue to which the Board must address itself is simply the definition of an appropriate bargaining unit under section 6(1) of the Act. The applicant, however, is faced with the same difficulties encountered by unions such as the Christian Labour Association of Canada and the Canadian Union of Construction Workers, or by "industrial" unions when they commenced to organize in the construction industry, in that these unions do not have the necessary history to qualify as a *craft* union within the meaning of section 6(2) of the Act. Section 6(2) reads:

Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to established trade union practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

Accordingly, the Board began to certify such unions in their early history only for "all employee" units, in the same way as it normally does in certifications taking place outside of the construction industry. Because of the special vulnerability of the construction industry to jurisdictional disputes, however, the Board subsequently amended its practice in the construction industry and began to grant certificates to these non-craft unions in terms of all of the trades employed on the date of the application. See *Sterling Tile Limited*, [1970] OLRB Rep. Feb. 1346; *Fielding Construction Company*, [1970] OLRB Rep. Jan. 1205, and Board Practice Note No. 11. This was still, in effect, an "all employee" unit, but frozen as of the date of the application, so as to minimize the potential for jurisdictional disputes which subsequent accretions to the unit might cause.

6. In the present case, the rationale of the applicant in seeking to represent only the



flooring and not the roofing division of the respondent can be gleaned from the following passage in the testimony of Joseph Petrocevic, the applicant's business manager:

“Q. Why have you applied for just the flooring division?

A. We've already applied for the masonry division. Roofers do not do a kind of work we're familiar with. It's not in the collective agreements we've negotiated. It's a different trade, involving different tools, materials, and knowledge of the work.”

The applicant's position, in other words, comes very close to seeking recognition of “craft” status from the Board, even though the applicant must (and did) rely solely on the determination of “an appropriate bargaining unit” under section 6(1) of the Act.

7. The Board on the evidence does not find it appropriate to grant the limited bargaining unit sought by the applicant in this case. The Board's normal concerns over undue fragmentation must be even greater in the construction industry because, as noted earlier, of the greater risk of jurisdictional disputes. The evidence before the Board in this very case tended to underscore the potential for disagreement over what is “flooring” and what is “roofing” work in multi-storey buildings. In addition, the present degree of interchangeability between the two divisions provides an increased opportunity for continuity of employment when one of the divisions is experiencing a temporary period of reduced activity. This obviously is of considerable benefit both from the point of view of the respondent, and of the employees affected. The incident of such interchange was confirmed by the evidence of the applicant's won witnesses, and the Board does not find the respondent's position in this regard to be inconsistent with its reply in the other application for certification (Board File No. 0014-80-R). A fair reading of that Reply indicates that the respondent was there distinguishing the masonry division, which was the subject matter of that displacement application, from its other two divisions. The Board further notes that all of the parties to that application ultimately agreed that the application was confined to the masonry division, and it was on that basis that the intervener was orally declared by the Board to have no status to participate in the present proceedings.

8. Having regard to the agreement of the parties with respect to the geographic designation of the unit, the Board finds that all employees of the respondent working in either its roofing or flooring division in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff, constitute a unit of employees appropriate for collective bargaining. Putting the matter at best for the applicant, the Board, having regard to the material before it, finds that there were 25 employees in the bargaining unit on the date of the application, being 10 in the flooring division and 15 in the roofing division. The applicant has filed membership documents with respect to six of the employees in the unit.

9. Based on all of the evidence before it, the Board finds that less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application for a pre-hearing vote was made.

10. The Registrar will destroy the ballots cast in the pre-hearing representation vote

taken in this matter following the expiration of 30 days from the date of this decision, unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

11. The application is dismissed.
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**1653-80-R** Peter Muscat and a Group of Employees, Applicant, v. United Food and Commerical Workers International Union, Local P287, Respondent, **Beef Terminal (1979) Limited**, Intervener.

**Practice and Procedure – Termination – Grievance as to whether employees properly at work pending before arbitration board – Outcome of award affecting number of employees in unit for termination purposes – Whether Board awaiting outcome of arbitration proceedings**

**BEFORE:** N. B. Satterfield, Vice-Chairman, and Board Members C. G. Bourne and B. Armstrong.

**APPEARANCES:** *E. Rovet and M. Powell for the applicant; Harold F. Caley and Stan Henderson for the respondent; James H. Wilson for the intervener.*

**DECISION OF THE BOARD;** March 6, 1981

1. The name: “Amalgamated Meat Cutters and Butcher Workmen of North America A.F.L. - C.I.O. - and its Local P287” appearing in the style of cause of this application as the name of the respondent is amended to read: “United Food and Commercial Workers International Union, P287”.

2. This is an application under section 49(2) of *The Labour Relations Act* in which the applicant is seeking a declaration from the Board that the respondent United Food and Commercial Workers International Union, Local P287 (“the union”) no longer represents the employees of Beef Terminal (1979) Limited (“the employer”) in the bargaining unit set out in the agreement to which the employer and the union are bound.

3. At the hearing into this application, counsel for the union questioned whether the Board could determine the application until a board of arbitration had determined whether, *inter alia*, persons who had been recalled to work following a hiatus in the operation of the employer’s business had been recalled pursuant to the relevant clauses of the collective agreement. The arbitration board was being established at the time of the hearing. Counsel contended that, until it decided that issue, this Board could not determine, as section 49 requires it to do:

- (a) whether the application was made by any of the employees in the bargaining unit (subsection 2 of section 49);

- (b) the number of employees in the bargaining unit at the time the application was made (subsection 3 of section 49), and
- (c) whether not less than 45 percent of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the union (subsection 3 of section 49).

While the applicant and the employer did not agree with the union's contention, they did agree that the Board should decide this issue before proceeding with the application rather than reserving its decision on the issue and proceeding to hear the application on its merits. This decision deals only with that preliminary issue.

4. The question of who are employees in the bargaining unit when an application is made under section 49 of the Act is determined from lists of employees who were employed at the time the application was made. For the purpose of this list, persons must be at work at some point within the thirty days before the date of application as well as within the thirty days after the date. The reasons underlying that rule are set out in the Board's decision in *Sydenham District Hospital*, [1967] OLRB Rep. May 135. Once the list has been settled, the answers to the questions posed in items 3(a) and 3(b) above can be readily determined. The answer to the question of whether not less than 45 per cent of the employees on the list have signified voluntarily, in writing, their support for the application is determined as at the terminal date for the application, which in this case was November 14, 1980. That is the date set for this purpose pursuant to the Board's authority under section 92(2) (j) of the Act. If the Board, having applied those rules, determines that not less than 45 per cent of the employees no longer wish to be represented by the union and directs that a representation vote be held, then the employees who are eligible to vote are those who were employed on the date of the Board's decision and who do not voluntarily terminate their employment or who are not discharged for cause by the date of the vote. On this basis, a list of eligible voters is prepared. In deciding whether a person was "employed" on the date of the decision, the Board has regard to the continuation of the employment relationship and the intent of the parties to preserve that relationship. *Canac Kitchens Ltd.* [1978] OLRB Rep. Aug. 723.

5. The source of the union's concern is readily apparent. If the Board were to proceed now to make the determinations required of it by section 49 of the Act and the union's grievance is later upheld in arbitration, there is a real possibility that the Board's determinations would be based on persons who were improperly at work on the relevant dates and whose interests, since they might expect to lose their employment, would be adverse to the union.

6. The Board considers the following additional facts useful in to its decision of whether to await the outcome of the arbitration before proceeding with this application. The employer previously has been found by the Board, differently constituted, to be the successor employer in the sale of a business within the meaning of section 55 of the Act. See: *Beef Terminal (1979) Limited*, [1980] OLRB Rep. Aug. 1167, a decision which issued Aug. 8, 1980. It contains the Board's declaration that "... Beef Terminal (1979) Limited is the successor of Beef Terminal and must continue to recognize [the union's] bargaining rights in the 'like unit' to that which existed prior to the transfer, and must continue to apply the collective agreement *mutatis mutandis* to that unit." That decision fits into the following sequence of events. The operations of the predecessor were closed down in mid-June 1979 according to the facts in the



aforementioned decision. The representations in the case at hand indicate that partial operations resumed in December 1979 by this employer. That immediately triggered the grievance referred to above in which the union has alleged generally that the collective agreement has been ignored by the employer and in particular, *inter alia*, the employer did not follow the recall provisions of the collective agreement when staffing the resumed operations. The union filed its application under section 55 of the Act on December 20th, 1979, according to the Board's records. The decision in that application issued Aug. 8, 1980, and was followed by this application on October 31, 1980. There is no dispute that the application is timely pursuant to sections 49 and 53 of the Act. By the time this application came on for hearing on November 21, 1980, the parties had appointed their nominees to the arbitration board in respect of the union's grievance and they were going through the process of selecting a chairman.

7. The foregoing circumstances make it obvious that the union has not been sleeping on its bargaining rights. It has sought to protect them in two ways: through the grievance procedure and under section 55 of *The Labour Relations Act*. The effect of the Board's section 55 decision has been to preserve with the employer, without interruption through to the making of this application, the bargaining rights which the union held for employees of the predecessor employer and its collective agreement with that employer. In pursuing its grievance to arbitration, it is continuing its efforts to protect its bargaining rights. Whether the union is correct in its allegation that the employer has not properly applied the recall provisions of the collective agreement is a matter for the arbitrator to decide. Whether the union's bargaining rights are to be terminated by this application is a matter which only the Board can determine. The Board is of the view that it should not await the decision of the arbitrator before proceeding with that determination. One reason for not doing so is the Board's reluctance to add further delay to that which already has occurred. Another is that, even if the arbitrator rules that some or all of the employees who were at work when the application was made should not have been recalled (or possibly newly hired), that might still leave the Board with the problem of who is eligible to vote if the application succeeds that far.

8. The Board is aware that by declining to await the results of arbitration, it may find itself having to step into the shoes of the arbitrator, for the purposes of this application, and interpreting the collective agreement in order to decide whether the employees actually at work when the application was made are employees for all purposes of this application. If so, it would not be the first time that the Board has had to interpret terms of a collective agreement in order to discharge its jurisdiction under the Act. That is not to say, however, that the Board has decided that it cannot proceed without resorting to that step; that will be decided only when the Board proceeds to hear the case fully on its merits.

9. The Board accordingly, will proceed forthwith to process this application and the matter is referred to the Registrar to be listed for hearing on the first date available.

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**2410-79-R** United Food and Commercial Workers International Union, A.F.L. - C.I.O. - C.L.C., Applicant, v. **Bright Veal Meat Packers Ltd.**, Globe Wholesale Meats Inc., Respondent.

Related Employer—Related employers carrying on similar businesses—Certification application relating only to one business—Whether employer entitled to request related employer declaration.

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** *James Hayes, Vincent Gentile and Stan Henderson for the applicant; Philip Wolfenden and Michael A. Spensieri for the respondents.*

**DECISION OF THE BOARD;** March 9, 1981

1. This is an application for certification essentially for all employees of the meat-wholesaling operation of Bright Veal Meat Packers Ltd.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of *The Labour Relations Act*.

3. The operation in question is carried on in one-half of a building located in Metropolitan Toronto. The principles and owners of the corporation, the business and the building are Guido Tomasetti and Pat Dibiasi. In the other half of the building, Messrs. Tomasetti and Dibiasi carry on a similar meat-wholesaling operation through a second corporate vehicle which they own, being Globe Wholesale Meats Inc. Bright Veals employs approximately 10 persons, and Globe Meats 15. As noted, the applicant seeks bargaining rights only for the employees of Bright Veal. The respondent, Bright Veal, however, asks the Board to apply the provisions of section 1(4) of the Act, so that the Board would be able to describe the bargaining unit in terms which would include the employees of both companies. Section 1(4) provides:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The applicant argues that in light of the labour relations purposes of section 1(4), it is inappropriate to apply section 1(4) in an application for certification at the request of the *employer*, (particularly where its effect would be to thwart the acquisition of bargaining rights) and that, in any event, there is no compelling reason for the Board to do so in the case now before it.

4. The remainder of the material facts can be stated briefly. Bright Veal is licensed to sell federally-inspected meat; Globe is not. Because of this, a brick wall separates the two op-

erations and runs the full length of the building. There is no internal access between the two sides. The building stands at the corner of Signet Drive and Fenmar Drive; Bright Veal has an entrance on Fenmar Drive, and from the loading dock. Globe Meats has an entrance on Signet Drive, and also from the loading dock. Overhead tracks run through Bright Veal, outside to the loading dock, and inside again through Globe Meats. Because of the difference in licensing between the two areas, the track can only move meat from Bright to Globe, and not vice-versa.

5. Virtually all aspects of the two businesses are run by Mr. Dibiasi and Mr. Tomasetti. Globe Wholesale Meats Inc. began operating in 1975. In 1977, Bright Veal Meat Packers Ltd. was incorporated and began operating as well, initially using employees of Globe. Bright Veal generally deals with the larger supermarket chains, and handles generally larger orders and cuts. Globe Meats caters more to the smaller stores, and its orders tend to be cut smaller and boxed. Bright Veal uses the Fenmar Drive address in the course of its business, while Globe Meats uses Signet Drive. Each company has its own telephone number and stationery. Mr. Tomasetti testified that the reason for the use of separate street addresses, telephone numbers, and corporate names was to make it less obvious to their customers that Dibiasi and Tomasetti serviced both the large and small competitors. Mr. Tomasetti does the buying for both businesses, through Bright, which then invoices Globe for its share. The orders from both companies are then shipped out on the same trucks, which are owned by Bright Veal and driven by Bright employees. The trucks carry only the "Bright Veal" name on their side. The drivers of the trucks all report to the cashier-dispatcher, whose office is in the Globe half of the building. Bright does not charge Globe for any trucking services.

6. The Bright Veal employees skin, split and dress the carcasses, and are composed of skinners and helpers, as well as truck-drivers. The Globe Meat employees receive their meat from Bright Veal after it has been split. They then cut the meat into smaller portions and box it. Globe employees consist of butchers and packagers, as well as one employee who operates a small retail store on the Globe side. Packaging is generally lighter work, and is done by female employees of Globe. Work on the Bright side is somewhat heavier and perhaps slightly more skilled than on the Globe side, although not so much so that one or two of the Globe butchers cannot help out with the skinning in peak periods. There are ten butchers on the Globe side, but only three skinners on the Bright side. The foreman on the Bright side may on occasion come to the Globe side to cut off some pieces to complete an order for Bright.

7. All employees are hired directly by Mr. Tomasetti without reference to either company name in the advertising. Once hired, Mr. Tomasetti decides which company to assign them to. All smocks worn by employees on either side carry the name "Globe Meats" on the back. Both operations are administered through a common office located in the building. Each of the two groups of employees has its own entrance, lunchroom and change-room, however, and there is virtually no intermingling in that regard. There is, in addition, a different foreman for each group. Employees on each side are paid by cheques bearing the name of their own company.

8. Apart from the overall integration described above, there appear to be three main areas of interchange, or functional cooperation, between employees of the two operations. The Board finds that employees from one operation regularly join with employees from the other in the loading and unloading of the trucks, depending on who is available. The Board also finds that when, on occasion, Bright Veal requires meat to be boxed, the boxing is done by Globe packagers. It appears that the Globe employees will perform this task sometimes on



their own side, and finds that there are at least one or two butchers on the Globe side capable of skinning on the Bright side, and that these employees are in fact called upon to do so from week to week, on a regular basis, when Bright Veal finds itself shorthanded.

9. As a matter of statutory interpretation, the Board cannot accept the position of the applicant that section 1(4) of the Act cannot be invoked by the employer. The section in its own terms states:

... the Board may upon the application of any person, trade union or council of trade unions concerned...

As can be seen, "trade unions" and "council of trade unions" are specifically referred to. Had the Legislature desired to stop there, it could have done so very easily. But instead it chose to include the word "person", which by virtue of the *Interpretation Act*, R.S.O. 1970, c.225, s.30 can clearly include a "corporation" or similar legal entity which would act in the capacity of an employer. (For a comparable analysis of section 123 of the Act, see *Dover Corporation (Canada) Ltd.*, [1972] OLRB Rep. May 435.)

10. There would appear to be no basis for the Board, therefore, to find that the section, as drafted, cannot be invoked upon the application of an employer. The Board clearly assumed this in *Forest Public House*, [1974] OLRB Rep. Jan. 40, although in that case there was insufficient intermingling to cause the Board to exercise its discretion to grant the employer's request. Perhaps more significantly, the Board in *Industrial-Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029, for the first time engaged in a comprehensive analysis of the purposes of the section. It should be noted that the Board first had this to say:

9. Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

This is not the problem in the present case. The Board went on, however, to comment on some of the other contexts in which the Board had come to apply section 1(4), and continued as follows:

12. So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of

situation where section 1(4) was applied is found in *Walters Lithographing Company Limited, et al*, [1971] OLRB Rep. 406.

13. It is in these types of situations that the interests of the parties in having the Board treat separate employers as constituting one employer for the purpose of the Act became apparent, and it is for that reason that section 1(4) was enacted.

11. The Board finds these latter comments from the *Industrial-Mine Installations* case to be pertinent to the case now before it. Needless to say, the Board must necessarily be vigilant in assessing the apparent merit of arguments which may unduly delay the processing of an applications for certification, and a marginal degree of integration would not likely cause the Board to proceed at length with a request that section 1(4) be applied. But the Board, on the other hand, cannot shut its eyes to the creation of a situation, through piecemeal certification, which would unreasonably restrict the employer in the manner in which it has always carried on its business, as well as creating the potential for different trade unions becoming bargaining agent for essentially integrated segments of the business.

12. In the present case, the applicant concedes that the basic conditions of section 1(4) have been made, and that indeed, the applicant itself would likely be in a position to obtain from the Board in this case a section 1(4) declaration, had it elected to request one. The applicant argues, however, that no compelling labour relations purpose exists here for granting the declaration when it is the *employer* who is making the request, particularly where the practical result would be to thwart the acquisition of bargaining rights. The Board has always noted that the right to self-organize, however, must be reconciled with other considerations of an "appropriate" bargaining unit (see, e.g., *Westeel-Rosco Limited*, [1979] OLRB Rep. Nov. 1125), and, for the reasons given in the preceding paragraph, the Board does not consider it appropriate to grant a bargaining unit restricted to employees of Bright Veal Meat Packers Limited. The Board has taken into account the fact that it is the employer itself which chose to present two separate faces of its operation to the public, and that the applicant has proceeded to organize along those corporate lines. The two faces, however, were adopted for commercially-oriented purposes, and there are few facts before the Board that would not have been apparent to employees working on either side of the wall. Accordingly, the Board does not in the present case find the corporate posture adopted by the employer, for its business reasons, to be controlling with regard to the labour-relations issues which the Board must determine.

13. Of perhaps greater significance is the fact that the employer itself has diminished the community of interest between the two employee groups by designating separate entrances, lunchrooms and locker-rooms. This, however, appears to be a derivative of the requirement by licensing authorities that there be no internal access between the two sections of the buildings, in view of which the employer has, it would appear for reasons of efficiency, chosen to locate employee entrances and rest areas in proximity to the employee's normal work areas. On the facts here, the Board finds this circumstance not sufficient to override the labour-relations consequences of what the Board finds to be a comprehensive integration of the two operations, with both regular and significant intermingling between the employees of the two groups.

14. The Board accordingly declares Bright Veal Meat Packers Ltd. and Globe Wholesale Meats Inc. to be one employer for the purposes of *The Labour Relations Act*. Globe

Wholesale Meats Inc. is added as a respondent to these proceedings. The Board finds that all employees of the respondents in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

15. Having regard to the evidence filed with the Board together with the number of employees in the combined unit, the Board further finds that less than forty-five per cent of the employees of the respondents in the bargaining unit at the time the application was made were members of the applicant on March 31, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. The application is accordingly dismissed.

**0823-80-R Canadian Union of Public Employees and its Local 6,  
Applicant, v. The Corporation of The Regional Municipality of Sudbury,  
Respondent, v. Ontario Public Service Employees Union, Intervener.**

**Bargaining Rights – Sale of a Business – Water and sewage plants transferred from province to municipality – Intermingling of employees – Province having collective agreement with intervener – Applicant holding bargaining rights for all employee unit of municipality – Effect of transfer on bargaining rights – Effect of *Successor Rights (Crown Transfers) Act* considered**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** Mario Hiki, Roger D. Neely and Gary Ralph for the applicant; B. R. Baldwin, H. Hatton and D. Partington for the respondent; Chris G. Paliare and Pauline R. Seville for the intervener.

**DECISION OF THE BOARD; March 17, 1981**

1. This is an application under section 5 of *The Successor Rights (Crown Transfers) Act*, 1977. The applicant (hereinafter CUPE) seeks a declaration that as a result of the transfer of certain water and sewage treatment plants from the Province to the Corporation of the Regional Municipality of Sudbury it is the bargaining agent for all employees of the respondent (hereinafter the Regional Municipality) covered by the scope clause of its collective agreement. It seeks a further declaration that the scope clause in the CUPE agreement constitutes an appropriate bargaining unit and that the Regional Municipality is bound by the collective agreement between itself and CUPE and is not bound by any collective agreement between the intervener (hereinafter OPSEU) and the Crown in the Right of Ontario. In other words it seeks a declaration that would make it the sole bargaining agent of employees previously represented by OPSEU.



2. The facts are not in dispute. Until recently the Province of Ontario, through the Ministry of Environment, operated certain sewer and water facilities in and around Sudbury. By an agreement between the Province and the Regional Municipality made May 28, 1980, effective July 1, 1980, the parties executed an interim transfer (pending Ontario Municipal Board approval) of a number of facilities to the Regional Municipality. The Transfer included sewage treatment plants, sewage lift stations, wells, a water treatment plant, water storage tanks, a water booster station, a trunk water main and metering stations variously located in Sudbury, Azilda, Chelmsford, Valley East, Coniston, Dowling, Rayside-Balfour, Whanapitae and Onaping. Some twenty-four of the employees of the Ministry of the Environment working in those facilities were represented by OPSEU under its province-wide agreement in respect of all public servants, under *The Crown Employees Collective Bargaining Act*. As of July 1, 1980 they became employees of the Regional Municipality.

3. Prior to the transfer of the provincial facilities the Regional Municipality operated a number of its own water and sewage plants in and around Sudbury, including facilities at Levack, Falconbridge, Lively, Sudbury, Capreol and Garson. Approximately twenty-two employees working in those facilities have been represented by CUPE as part of a larger bargaining unit under its collective agreement in respect of all "outside" employees of the Regional Municipality.

4. Since the transfer there has been an intermingling of the employees represented by the two unions. The evidence of Douglas Partington, the Co-ordinator of Environment Service for the Regional Municipality establishes that there has been a change in the deployment of manpower in the merged facilities. The plants under the Ministry of Environment previously operated with a distinct crew in each area. In Valley East, for example, a single crew operated the sewage treatment plant, the sewage pumping stations, the wells and the booster. Like other similar crews in the system the crew at Valley East had its own plant serviceman and electrician. Under the Regional Municipality work is now allotted in part by function rather than by location. One crew operates wells and water treatment plants, another operates sewage stations and a unified crew of electricians and plant servicemen see to the maintenance of all of the plants. As a result employees from the two unions have been intergrated and work side by side.

5. Before the enactment of *The Successor Rights (Crown Transfers) Act*, 1977 the bargaining agent of provincial employees was at a distinct disadvantage whenever an undertaking was conveyed from the provincial Crown to an employer in the private sector. There was then no law equivalent to section 55 of *The Labour Relations Act* to provide that the union's bargaining rights continued after the sale or transfer. (*The Municipality of Metropolitan Toronto*, [1975] OLRB Rep. Oct. 777). This Board had no jurisdiction to make orders protecting the union's rights. Nor could it sort out the equities between OPSEU and another union with conflicting bargaining rights. That hiatus in the legislation was cured by *The Successors Rights (Crown Transfers) Act*, 1977. The sections pertinent to this application are as follows:

1.-(1) In this Act,

(b) "Board" means the Ontario Labour Relations Board;

(f) "transfer" means a conveyance, disposition or sale;

- (g) "Tribunal" means the Ontario Public Service Labour Relations Tribunal;

2.-(1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

3.-(1) Where an undertaking is transferred from an employer to the Crown and a bargaining agent has a collective agreement with the employer in respect of employees employed in the undertaking, the Crown is bound by the collective agreement as if a party to the collective agreement until the Tribunal declares otherwise.

4.-(1) Where an undertaking was transferred from the Crown to an employer or from an employer to the Crown and an employee organization, trade union or council of trade unions was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer and,

- (a) a question arises as to what constitutes a unit of employees that is appropriate for collective bargaining purposes in respect of the undertaking; or
- (b) any person, employee organization, trade union or council of trade unions claims that by virtue of section 2 or 3, a conflict exists as to the bargaining rights of the employee organization, trade union or council of trade unions,

any person, employee organization, trade union or council of trade unions concerned may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, and the Board or the Tribunal, as the case requires,

- (c) may determine the composition of the unit of employees referred to in clause a;
- (d) may amend, to such extent as the Tribunal or the Board considers necessary,
  - (i) any bargaining unit in any certificate issued to any trade union or council of trade unions,
  - (ii) any bargaining unit defined in any collective agreement,
  - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of the undertaking, or,

4.-(1) Where an undertaking was transferred from the Crown to an employer or from an employer to the Crown and an employee organization, trade union or council of trade unions was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer and,

- (a) a question arises as to what constitutes a unit of employees that is appropriate for collective bargaining purposes in respect of the undertaking; or
- (b) any person, employee organization, trade union or council of trade unions claims that by virtue of section 2 or 3, a conflict exists as to the bargaining rights of the employee organization, trade union or council of trade unions,

any person, employee organization, trade union or council of trade unions concerned may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, and the Board or the Tribunal, as the case requires,

- (c) may determine the composition of the unit of employees referred to in clause a;
- (d) may amend, to such extent as the Tribunal or the Board considers necessary,
  - (i) any bargaining unit in any certificate issued to any trade union or council of trade unions,
  - (ii) any bargaining unit defined in any collective agreement,
  - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of the undertaking, or
  - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of the undertaking.

(2) Where an undertaking is transferred from the Crown to an employer or from an employer to the Crown, any person, employee organization, trade union or council of trade unions may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown,

- (a) within sixty days after the transfer of the undertaking; or
- (b) within sixty days after written notice is given by the employee



organization, trade union or council of trade unions of desire to bargain to make or renew, with or without modifications, a collective agreement.

and the Board or the Tribunal, as the case requires, may terminate the bargaining rights of the employee organization, trade union or council of trade unions bound by a collective agreement in respect of employees employed in the undertaking or that has given notice, as the case may be, if in the opinion of the Board or the Tribunal, the transferee of the undertaking has changed the character of the undertaking so that it is substantially different from the undertaking as it was carried on immediately before the transfer.

5.-(1) Notwithstanding section 2, where an undertaking is transferred from the Crown to an employer who intermingles the employees employed in the undertaking immediately before the transfer with employees employed in one or more other undertakings carried on by the employer or an undertaking is transferred from an employer to the Crown and employees employed in the undertaking immediately before the transfer are intermingled with employees employed in other undertakings of the Crown and an employee organization, trade union or council of trade unions that is the bargaining agent in respect of employees employed in any of the undertakings applied to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, the Board or the Tribunal, as the case requires,

- (a) may declare that the employer or the Crown, as the case may be, is no longer bound by the collective agreement referred to in section 2 or 3;
- (b) may determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) may declare which employee organization, trade union or council of trade unions shall be the bargaining agent in respect of each such bargaining unit; and
- (d) may amend, to such extent as the Board or the Tribunal considers necessary,
  - (i) any certificate issued to any trade union or council of trade unions,
  - (ii) any bargaining unit defined in any collective agreement,
  - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of any of the undertakings, or

- (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of any of the undertakings.

(2) Where an employee organization, trade union or council of trade unions is declared to be a bargaining agent under subsection 1 and it is not already bound by a collective agreement with the successor employer in respect of employees employed in the undertaking that was transferred, the employee organization, trade union or council of trade unions is entitled to give to the successor employer written notice of desire to bargain to make or renew, with or without modifications, a collective agreement.

8. Before disposing of an application under this Act, the Board or the Tribunal, as the case may be, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

11.-(1) Where, on an application before the Board under this Act, a question arises as to whether an undertaking has been transferred from the Crown to an employer, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

6. The Act is clearly designed to permit the Board to weigh and resolve competing interests affected by the transfer of an undertaking from the Crown to the private sector. The union representing the Crown employees has an interest in preserving its bargaining rights after the transfer. A union with prior bargaining rights for employees of the purchaser has an interest in protecting the integrity of its bargaining rights by seeing that the scope clause in its collective agreement is given full force and effect. The employer and the employees each have an interest in seeing collective bargaining between them continued in bargaining structures most conducive to a sound relationship, with a minimum of dislocation and fragmentation.

7. As the few applications previously brought illustrate, the Act is obviously drafted pragmatically to give the Board the latitude to respond to the particular fact situation before it. In some instances of a transfer and merger of employees the Board may realign bargaining structures in a number of separate units that are consistent with Board policy, and dispose of the application by polling the employees within each unit as to their preference of bargaining agent. (e.g. *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. Aug. 759). Where, on the other hand, there is an intermingling of employees in the merged enterprise and the great preponderance of them have been represented by one of two competing unions the Board may follow the principles in *Alliance Dairy*, [1966] OLRB Rep. Aug. 336 and declare the preponderant union to be bargaining agent without a representation vote. (e.g. *The Regional Municipality of Halton*, [1978] OLRB Rep. Aug. 750). Where there has been a transfer of a Crown undertaking but no intermingling of employees, and it appears in light of established bargaining history that the transferred employees constitute an appropriate bargaining unit, the Board may declare a continuation of the bargaining rights of the union which has represented the Crown employees. (e.g. *The Corporation of the City of Timmins*, [1980] OLRB Rep. May 656).

8. As the cases illustrate, the Act contemplates a flexible approach to applications made under it. There are no mechanical solutions; the ultimate resolution of the application must ultimately depend on the labour relations equities of the case.

9. In the instant case counsel for OPSEU raised the question, albeit not forcefully, whether there has in fact been a “transfer” within the meaning of the Act. It is common ground that the transaction by which the Regional Municipality acquired the Crown undertaking is subject to the approval of the Ontario Municipal Board. That approval is presently pending. Counsel for OPSEU suggested that the fact that OMB approval has not yet been given might take this application outside the scope of the Act, predicated as it is on there being the “transfer” of an undertaking from the Crown.

10. It goes without saying that in this Province a municipality can do those things which it has the statutory power to do under *The Municipal Act*, R.S.O. 1970, c. 284 as amended, subject to all of the conditions set out in that legislation. It appears that as a matter of municipal law the acquisition from the Crown of sewage and water works by a municipality is subject to the approval of the Ontario Municipal Board. It must be emphasized that we are not here concerned with whether there has been a “transfer” within the technical sense of *The Municipal Act*. The threshold issue is whether there has been a “transfer” for the purposes of *The Successor Rights (Crown Employees) Act*, 1977. The meaning of the word “transfer” within *The Successor Rights (Crown Employees) Act*, 1977, must, like the words “sale of a business” in section 5 of *The Labour Relations Act*, be construed having regard to the purposes of that legislation (cf *Thorco Manufacturing Ltd.* 65 CLLC ¶16, 052). The Act is designed to quiet disputes about bargaining rights and provide relief to employers, employees and unions alike when there has been a change of employer as an undertaking passes from the public sector to the private or *vice versa*. It is in that sense that the word “transfer” as defined in section 1(1)(f) of the Act is to be construed.

11. In *Owen Sound General and Marine Hospital*, (supra), OPSEU argued that the date of the transfer of a psychiatric hospital from the Crown must depend on the qualification of the merged undertakings as a psychiatric facility within the legal designations found in *The Mental Health Act*, R.S.O. 1970, c. 268, as amended, and *The Mental Hospital Act*, R.S.O. 1970, c. 270, as amended. These technical qualifications were effective only May 3, 1980 although the actual transfer of functions from the Crown to the private hospital occurred on April 1, 1978. In that case the Board determined that the date of the transfer for the purposes of the Act was April 1, 1978. In so concluding it commented, (at p. 765):

While the amendment of the legal designations has to be given some weight, the Board considers that this factor cannot be determinative in identifying the date at which the transfer took place. It is the time of the actual *transfer of the functions of the undertaking* from the Crown to the new employer that must be identified. This time can only be identified by a consideration of all the circumstances surrounding the transaction. (emphasis added)

In our view the foregoing passage reflects the proper approach to construing the words “conveyance, disposition or sale” in section 1(1) of the Act. The Act should be given a broad and liberal interpretation consistent with its legislative purpose. *The Interpretation Act*, R.S.O. 1970, c.225, s.10).



12. In the instant case there was a transfer of functions from the Ministry of Environment to the Regional Municipality on July 1, 1980. From that date the water treatment and sewage facilities previously under the Ministry have been operated exclusively by the Regional Municipality. As of that date the employees of the Ministry of Environment became employees of the Regional Municipality. Since then they have been on the Regional Municipality's payroll and have been subject to its exclusive supervision and direction. For all practical purposes there has been a change of employer. While technically that change may be reversed by a determination of the Ontario Municipal Board, from the viewpoint of the existing labour relations of the parties it is complete. In these circumstances the Board is satisfied that on July 1, 1980 there was a transfer of an undertaking for the purposes of *The Successor Rights (Crown Transfers) Act*, 1977. Counsel raised the issue of what might happen if OMB approval should eventually be withheld. We need make no comment upon that possibility save to say that the legislation would appear to contain ample scope to resolve any problems that might arise.

13. We turn to consider the merits of the application. Counsel for OPSEU concedes that there has been an intermingling of employees for the purposes of section 5(1) of the Act. He argues however that the Board should distinguish between the maintenance employees, on the one hand, and the water treatment and sewage facilities employees on the other hand. He maintains that while there might be a substantial intermingling of the maintenance employees, the employees who work as operators in the sewage treatment facilities and in the water supply facilities are only slightly intermingled, with a great preponderance of them being employees represented by OPSEU. On that basis he asks the Board to find that the operators, lab technician and electrician who work in the water supply and sewage treatment facilities constitute an appropriate bargaining unit within the meaning of section 4(1)(b) and to declare, pursuant to section 1(1)(c) of the Act that OPSEU remains the bargaining agent of the employees in those classifications. In support of his argument he stresses the purpose of the Act is to preserve existing bargaining rights and refers the Board in particular to the decision in *The Corporation of the City of Timmins*, (supra).

14. We find that there are important distinctions between *The City of Timmins* and this case. In that application, which also involved the transfer of water treatment and sewage facilities, the Board expressly found that there had been no intermingling of employees and no interchange between jobs done by OPSEU represented employees and those performed by employees in CUPE's bargaining unit. Moreover, the CUPE bargaining unit was not an "all employee" unit, but was described simply in relation to certain classifications. In that case the employer endorsed OPSEU's position. There being a clear division between the job functions and locale of the OPSEU and CUPE employees respectively, the Board saw no reason not to preserve the bargaining rights of OPSEU, reasoning along the lines of a similar decision of the Board under section 55 of the Act in *The City of Peterborough*, [1979] OLRB Rep. Feb. 133.

15. In this case there is a substantial intermingling of employees who work in the sewage and water facilities of the Regional Municipality. While the maintenance men may move among the various locations, they interact on a daily basis with the operators who work within them. There is, moreover, some intermingling among the operators themselves, notably at the Dowling Sewage Treatment Plant and at Sudbury and Lively.

16. The Regional Municipality opposes OPSEU's request to retain a vestigial unit. Its counsel argues that it is now in an invidious position. Employees in its facilities work side by

side and perform the same work at substantially different rates of pay and receive different benefits under two separate collective agreements. It submits that its water and sewage operations are an integrated whole, and that the intermingling of the employees in all classifications justifies treating them as one group for collective bargaining purposes. Its counsel expresses the municipality's concern that the fragmentation of this aspect of its operations will cause undue expense in bargaining and administering separate collective agreement, with the potential for whipsawing between the two unions. He also raised concerns about the employer's water and sewage facilities being in double jeopardy with the possibility of separate strikes at different times by maintenance employees under CUPE and operators under OPSEU.

17. Counsel for CUPE joins the employer in urging the Board to terminate OPSEU's bargaining rights entirely. He submits that the bargaining unit sought by OPSEU has little or no real bargaining history to support it since the employees in the water and sewage facilities represented by OPSEU were previously part of a province-wide bargaining unit, and were not themselves an established unit, as was the case in the *Peterborough* decision. He also stressed that unlike in the *Timmins* case, here the bargaining rights in CUPE's collective agreement are in respect of "all employees" of the Regional Municipality except office and clerical employees who are represented by a separate CUPE local.

18. In our view the facts of this case do not make a compelling argument in favour of OPSEU's position. The establishment of a separate and new OPSEU bargaining unit that will include only some of the employees who work in the sewage and water treatment facilities, with others being represented by CUPE, has little to commend it from a labour relations standpoint. To give effect to OPSEU's request would be to establish a new grouping of employees in a unduly fragmented structure. It could, for the reasons advanced by counsel for the Regional Municipality, create some genuine labour relations problems for the employer. As a result of changes implemented by the Regional Municipality its water and sewage operations are a single unit for administrative and business purposes. It would require compelling reasons to fragment only part of those facilities into a separate unit for collective bargaining purposes.

19. OPSEU's position would be more persuasive if it were contending for a unit that would include all employees in water and sewage facilities, including maintenance staff. It would be more compelling still if there were no intermingling of employees, as in the *Timmins* case. In this case, however, the lack of both of these factors makes a substantial difference.

20. In this case there is no clear history supporting the fractional bargaining unit proposed by OPSEU. To establish such a unit would sharply fragment the employees in this part of the Regional Municipality's operations forcing both employer and employees to operate within a less rational bargaining structure. It would require the employer to bargain twice and administer separate agreements in respect of employees in the same part of its operations. It would also risk leaving the employees in the small, vestigial unit with diminished authority at the bargaining table. In our view the industrial relations costs of that proposal clearly outweigh its benefits. We therefore decline to accede to OPSEU's request to amend the bargaining unit described in CUPE's collective agreement to carve out a portion of the employees heretofore represented by OPSEU. The unit of employees contained in the scope clause of that collective agreement constitutes the more appropriate bargaining unit in this case.

21. We consider next how to resolve the issue of representation. As the Board has noted, the number of employees previously included in the all employee bargaining unit represented by CUPE is considerably larger than the number of employees who have been represented by OPSEU. CUPE represents approximately 169 employees as compared to 25 for OPSEU. In these circumstances we need have little doubt about the relative support of the two unions among the employees in the bargaining unit. While, as the Board noted in *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445 at 449-50) a representation vote may sometimes be appropriate to resolve the transfer of a complex bargaining structure from one sector to another, there will also be instances where the principles in *Alliance Dairy Ltd.*, (supra) apply under *The Successor Rights (Crown Transfers) Act*, 1977. Where the bargaining structure that ultimately prevails is a comprehensive unit previously represented by one union and that union's membership strength is clearly preponderant, the Board may allow the merger to operate as though there had been an accretion to that bargaining unit and terminate the competing bargaining rights without a representation vote (e.g. *The Regional Municipality of Halton*, (supra)). We are satisfied that this is such a case.

22. The Board therefore declares that, effective on the date of this decision:

- (a) The Corporation of the Regional Municipality of Sudbury is no longer bound by the collective agreement between OPSEU and the Crown in Right of Ontario (represented by Management Board of Cabinet);
- (b) The employees of the respondent covered by the collective agreement referred to in paragraph (a) and those covered by the collective agreement between CUPE and the respondent constitute one appropriate bargaining unit which is defined as follows:

All employees of The Regional Municipality of Sudbury save and except foremen, persons above the rank of foreman, employees included and excluded under a subsisting collective agreement between The Regional Municipality of Sudbury and Canadian Union of Public Employees, Local 207, persons regularly employed for not more than twenty-four (24) hours per week, and students hired for the school vacation period.

- (c) both employees of the respondent formerly covered by the collective agreement referred to in paragraph (a) and those employees covered by the collective agreement between the respondent and CUPE are covered henceforth by the collective agreement between CUPE and The Regional Municipality of Sudbury.
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**1278-80-U Canadian Union of Public Employees, Complainant, v. Corporation of the Town of Petrolia, Respondent.**

**Change in Working Conditions – Section 79 – Contracting out resulting in lay-offs – Lay-offs carried out according to employee manual – Board satisfied decision made for bona fide business reasons – Whether management right to contract out and lay-off existed prior to onset of freeze – Whether employees had a right to work – Whether breach of statutory freeze**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members C. G. Bourne and H. Simon.

**APPEARANCES:** *M. G. Pennesi for the complainant; D. W. Brady, H. G. Kerby and G. Krammer for the respondent.*

**DECISION OF VICE-CHAIRMAN N. B. SATTERFIELD AND BOARD MEMBER C. G. BOURNE; March 26, 1981**

1. This complaint filed under section 79 of *The Labour Relations Act* alleges that the Corporation of the Town of Petrolia ("the employer") has violated section 70(1) of the Act which provides that:

"Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this act, and,

(i) seven days elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

The complainant trade union ("the union") has alleged that the employer has contracted out certain work resulting in the indefinite lay off of the three grievors Sidney Ringwood, Roland

Hopwood and Don Freer. The union contends that this act and its result is an alteration of working conditions contrary to the statutory prohibition contained in section 70(1) of the Act. The employer admits that the three grievors were laid off indefinitely as a result of its contracting out of work. It contends, however, that the employer was exercising a management right which existed prior to the onset of the statutory prohibition and it is a right that is protected by that prohibition.

2. The principal facts in this matter are not in dispute. The union filed an application for certification on April 22, 1980 and the employer received on April 28, 1980 notice of the application which was dated April 24, 1980. Interim certification was issued to the union May 26, 1980 and the formal certificate issued July 3, 1980. The work performed by the grievors was within the bargaining unit described in the interim certification. The union served notice to bargain with the employer, on June 3, 1980 pursuant to section 13 of the Act. The proposals contained the following provision, which has been a standard proposal used by the applicant for the past nine years in its negotiations with employers, as protection against lay offs arising from the contracting out of work.

“No employee shall be laid off on account of the Employer contracting out any of its present services.”

Bargaining commenced on June 19, 1980 and on August 18, 1980 the union requested the appointment of a conciliation officer. The employer notified the grievors in writing on September 11, 1980 that they were to be laid off on September 15, 1980 for an indefinite period. They were laid off essentially as notified and received pay in lieu of the statutory notice required under *The Employment Standards Act, 1974*.

3. The work which the employer has contracted out is the collection of garbage within the Town of Petrolia and the operation of the town's landfill site. This work has been done by employees of the employer since the Public Works Department was established in 1968. Prior to that it was done by contractors. The employer's Commissioner of Public Works, Mr. Gabriel Krammer, was given the responsibility of maintaining a watching brief on the cost of the in-house operation compared with a contracted service. During the last half of 1978, Krammer was approached by a private contractor concerning the operation of the employer's landfill site. By the end of the year the contractor made a specific proposal for taking over the landfill operation only but Krammer was not interested in any arrangement that did not include the garbage collection. From April 1979, being aware that a nearby township and the city of Sarnia had committed their garbage collection to this same contractor, Krammer was occupied during the ensuing four months with reviewing operating costs and budgets with Council and chairmen of key committees. During this same period he was also studying the efficiency of the garbage collection and landfill operations. In September he was approached again by the contractor who informed him that another nearby township was going to let a contract to the contractor for its garbage collection, a situation that would make it economically attractive to the contractor to be able to amalgamate the employer's garbage collection with that of the other three municipalities. The contract with the other township became a reality by November 1979. That event gave rise to a steady progression of discussions and meetings which resulted in the employer's Committee of the Whole deciding on April 22, 1980 that a detailed proposal for the work to be contracted out should be referred to individual members of Town Council in order for a decision to be made by Council at its next regular meeting on April 28, 1980.

4. The day on which the Committee of the Whole made its decision is the same day when the union filed its application for certification, the union representative and the employees having met the day before to prepare the application. The employer received the Board's notice of that application on the day for which the meeting of council had been set, April 28th. Council, having had advice of legal counsel, decided to postpone a decision on contracting out the garbage and landfill operations. At its May 26th meeting council authorized the employer's clerk-administrator to obtain proposals for the operations in question and, as a result, requests for proposals were advertised in the local paper on or about June 11, 1980. Council voted on July 14th to accept one of the tenders subject to an acceptable final contract. On September 8th it passed the by-laws authorizing execution of a contract for the collection of garbage and operation of the landfill. At the same meeting, council approved the the reduction of its work force by three employees and this resulted in the lay off of the three grievors.

5. The three employees were laid off pursuant to provisions in a document entitled Employees Manual ("the Manual"). This document contains terms and conditions dealing with grievances, discharge cases, seniority (including provisions for reducing the work force), job posting, transfers, overtime conditions, a wage schedule, vacations, statutory holidays and most of the conditions normally found in a collective agreement. While the Board's record in respect of the proceedings resulting in certification of the union contain no reference to an incumbent trade union, the union's evidence in the case at hand was that an association (the union's term) had carried on some form of collective bargaining relationship with the employer over a number of years. It was also the union's evidence that its own bargaining proposals for a first collective agreement were constructed either as amendments to the Manual or to incorporate parts of it into a collective agreement. Counsel for the employer did not assert that the Manual was a collective agreement and, despite the similarity of form, the Board concludes that the Manual is not a collective agreement within the meaning of section 1(1)(e) of the Act. The Board is satisfied, however, that the Manual is a written statement of the employer's policy in respect of the terms of employment contained therein for hourly-rated employees of the employer's Public Works Department. While it may not set out the full extent of the legal incidents of the employment relationship between the employer and its hourly-rated employees, the Board has no other evidence as to these legal incidents. At least, however, the Manual represents a substantial codification of the individual contracts of employment between the employer and its hourly-rated employees.

6. The provisions in the Manual for reducing the work force require the employer to lay off the most junior employees first, subject to certain skill, competence and efficiency requirements and to give 48 hours prior notice of the lay off. It is the uncontradicted evidence of the employer that it complied with these conditions when the three employees were laid off. The Manual also contains provision that "The...[employer], at all times, maintains its exclusive right to manage its operations and exercise all of the prerogatives of Management.". It contains neither an express right to nor an express prohibition against contracting out work performed by hourly-rated employees.

7. The evidence leaves no doubt that the employer's decision to contract out the operations in question was made for sound business reasons and for substantial economic savings. There is no evidence whatsoever from which it might be inferred that the employer was acting out of anti-union sentiment or responding to its employees having exercised their rights under the Act. The question before the Board, however, is not one of whether the



decision was justifiable, but whether the employer, by contracting out its garbage collection and landfill operations and causing the lay off of the grievors, has violated the freeze imposed by section 70 of the Act.

8. While it is sub-section 1 of section 70 that this complaint alleges has been violated, since the circumstances of this case include the fact that the employer received notice from the Board of the union's application for certification, sub-section 2 of section 70 was also brought into effect. It prohibits alteration by the employer of the same conditions, rights, privileges or duties of the employer and the employees as does section 70(1) until either the union gives notice of its desire to bargain pursuant to section 13 of the Act or the application for certification is withdrawn or the Board dismisses or terminates it. Once section 13 notice is given, sub-section 1 of section 70 is brought into play and both the employer and union are prohibited from altering, without the consent of the other, "...the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employees, the trade union or the employer, ...". Sub-sections 1 and 2 work together, therefore, to impose a freeze which continues from the receipt by the employer of the notice of application for certification until after one of the two specified events in items (a)(i) or (a)(ii) of section 70(1) has occurred after the Minister has appointed a conciliation officer or mediator or until the union loses its bargaining rights. The purpose of the statutory freeze, which in general terms is to provide a period of stability during which either a union may seek to gain bargaining rights or the parties to collective bargaining can enter into negotiations without the disturbance of unilateral change, has been discussed extensively by the Board in its many decisions dealing with section 70. For explanation of the purpose of the section 70(1) freeze see the Board's decisions in *AES Data Limited*, [1979] OLRB Rep. May 368; *Industrial Wire and Cable Company*, [1977] OLRB Rep. June 385; and *Kodak Canada Limited*, [1977] OLRB Rep. Feb. 19. An explanation of the purpose of the section 70(1) freeze is contained in the Board's decisions in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859; *Molson's Brewery (Ontario) Limited*, [1977] OLRB Rep. Aug. 526; and *Kodak Canada Limited*, *supra*.

9. Much of what these cases say is succinctly summarized in the following statement contained in the Board's decision in *AES Data*, *supra*, including a reference therein to *Spar Aerospace*, *supra*:

The purpose of section 70 is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of the bargaining or of propaganda. The status quo includes not only the existing terms and conditions of employment but also any other established benefits which the employees are accustomed to receive, and which can therefore be considered to be "privileges." It is clear that express promises, or a consistent pattern of employer conduct, can give rise to such privileges and that they are caught by the statutory freeze. It should be noted, however, that section 70 also freezes the "rights and privileges" of the employer. The section requires both parties to maintain the existing pattern of their relationship; that is, to conduct their business as before. In *Spar Aerospace Products Limited*, [1978] OLRB Rep. Oct. 859, the Board discussed the effect of section 70 in the following way:

The “business as before” approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. *The right to manage is maintained, qualified only by the condition that the operation be managed as before.* Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. *This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.* (emphasis added)

10. In the instant case the section 70(1) freeze began on April 28th when the employer received the Board’s notice of the union’s application for certification. Section 70(2) in turn gave way to section 70(1) on June 3, 1980 when the union served notice, pursuant to section 13 of the Act, of its desire to bargain. The section 70 freeze was still in effect on September 8th when Council decided to contract out the work and on September 15th when the grievors were laid off.

11. In order for the Board to find that the employer has violated the section 70(1) freeze, it must be able to find that the employer by its action of contracting out the work in question and laying off the three employees without the consent of the union, has altered “. . .the rates of wages or [some] other term or condition of employment or [a] right, privilege or duty, . . .” of the employer, the union or the three employees. Since an alteration of rates of wages is clearly not involved, the contracting out and the lay off must be found to constitute an alteration of some other term or condition of employment of the three employees or an alteration of a right, privilege or duty of the employer, the union or the three employees. Since there was no pre-existing contractual relationship between the employer and the union, there are no pre-existing rights, privileges or duties of the union to be protected from unilateral employer alteration. Therefore it becomes a matter of determining what right, privilege or duty of the employer or the employees or what other term or condition of employment have been captured by the freeze and altered by the employer’s unilateral action. Or, to put it another way, the Board must determine which, if any, legal incidents of the employment relationship, including privileges, which were in existence on the day before the freeze began, were altered on September 8th when Council decided to contract out its garbage collection and landfill operations and/or on September 15th when the three employees were laid off.

12. The union argues simply that the employer must exercise its rights to manage its operations in a way which does not violate the section 70 freeze and that, by contracting out the work in question and eliminating the jobs of the three employees, the employer has violated the freeze by interfering with the employees’ right to work. In the absence of any expansion of when and how the right to work was established, the Board is left to assume that either the union considers there to have been a right to work prior to the freeze or that the right was created by the onset of the freeze.



13. Counsel for the employer, on the other hand, argues that the employees do not have a right of ownership over their jobs to be captured by the freeze. Nor, counsel asserts, does the freeze require the employer to maintain a static work force since it does not prohibit the laying off or termination for cause of employees. In short counsel contends that the employer's actions have not altered any "...term or condition of employment or any right, privilege or or duty, ..." of the three employees. He points out that they were laid off wholly in accordance with the provisions in the Manual for the reduction of the working force and that these provisions were terms or conditions of employment (or privileges) captured by the freeze.

14. There clearly is no evidence that, the day before the freeze started, the employees had a proprietary right either to the jobs which they held or to employment with the employer which the next day was captured by the freeze. Nor did they have a right not to be laid off. In fact, the contrary situation is indicated by the provisions in the Manual governing the reduction of the work force. Their employment was subject to lay off, but they were protected to the extent of their seniority and were entitled to prior notice of the lay off. The corollary of their right to those conditions is the implicit right of the employer to reduce the work force as long as he proceeds by the rules of the Manual. These rights of the employees and the employer were captured by the freeze. Can it be argued, nonetheless, that the existing jobs or employment of the employees were "frozen" by the triggering of section 70 or that the freeze required the employer to maintain its work force at the level existing at the start of the freeze, results suggested by the unions argument? The Board thinks not. To hold so would prevent the employer from responding appropriately to the exigencies of its "business" and would contradict the Board's "business as before" approach to the application of section 70. In fact, the Board has recognized the right of an employer to lay off employees for lack of work where it was an implicit term of their individual contracts of employment that they could be laid off for that reason. See *Canadian General Electric*, [1965] OLRB Rep. Dec. 649. Therefore, on the evidence that the employer has laid off the three employees pursuant to the terms of the Manual, terms which were frozen by section 70, the Board finds that the lay off, *per se* is not a violation of the section 70 freeze.

15. If the lay off itself was not a violation of section 70, can the same be said for the employer's actions which caused the lay off; that is, the decision to contract out the garbage collection and landfill operations? Counsel for the employer correctly claims that the rights and privileges of the employer were frozen and thus protected by the effect of the section 70 freeze. The Board has previously found that employer's rights and privileges are protected by the section 70 freeze. See *AES Data Limited*, *supra*, at paragraph 10, including the reference quoted therein from the Board's decision in *Spar Aerospace Products Limited*, *supra*. The question remains, however, whether a right to contract out the work in question existed at the start of the freeze period.

16. Employer counsel maintains that the right to contract out work is contained in the employer's "...exclusive right to manage its operations and exercise all of the prerogatives of management," set out in the Manual and preserved by the section 70 freeze. He contends that this broad management right, as it might be applied to the contracting out of work, has not been diluted by any limit or prohibition in the Manual in respect of contracting out, or by any evidence that the employer has acted to limit the application of that right to the contracting out of work. Certainly the Board has recognized that an employer is not prohibited from exercising express management rights and that those rights are preserved by the freeze. In this respect see the Board's decision's in *Molson's Brewery (Ontario) Limited* [1977] OLRB Rep.



Aug. 526 and *Scarborough Centenary Hospital Association*, [1978] OLRB Rep. Oct. 949, which followed the first decision. In the former decision the Board found that the employer was acting properly under an express right frozen by section 70 to determine the schedules of shipping and distribution when, during the freeze period, it altered the shift schedule of some shipping employees. In the latter decision, the Board found that the employer had not acted contrary to section 70(1) of the Act when it responded to a change in part of its business by reclassifying an employee from full-time status to part-time, resulting in her exclusion from the bargaining unit in the expired collective agreement. The Board held that the employer was exercising an express right under the expired agreement, which had been preserved by the freeze, to determine the kind and location of machines and equipment, the number of employees required and their allocation.

17. Those two decisions deal with situations where the employers' actions are directly covered by an express management right to schedule hours of work or determine the allocation and number of employees required. In the instant case, the management rights statement does not express a right to contract out work, although it is stated broadly enough to encompass that right. While paragraph 10 of the Board's decision in *Molson's Brewery*, *supra*, which reads as follows seems to make a distinction in the kinds of management rights which are preserved by the section 70 freeze, it is still speaking to the need to identify a change in the terms or conditions of employment, or in rights, privileges and duties and must be read as saying nothing more.

"10. Before leaving this point we would stress that in the instant case we are dealing with an express right of management under the collective agreement. Our decision may well have been different had this express right not been included in the collective agreement and the respondent had instead relied only on the principle that management retains the right to initiate any changes in the work place which are not expressly restricted by the terms of a collective agreement. *It appears to us that any such general entitlement on the part of management to initiate change may well be limited by the effect of section 70(1).*" (emphasis added)

Just as the written expression of a right in a collective agreement does not assure its existence (see *A.N. Shaw Restoration Ltd.*, [1978] OLRB Rep. June 479, referred to in *Spar Aerospace*, *supra*), neither does the failure of a collective agreement to deal expressly with a right establish that none exists. While, in the first instance the Board may find that even the express right has been waived by conduct, in the second instance (or where, as in a "first agreement" situation, there is no collective agreement at all), of necessity the Board will have to look more closely at the totality of the evidence to determine whether the employer has by custom eliminated or restricted what otherwise would have been a normal, residual right of management; that is, whether the employer's past course of conduct has created a privilege upon which employees reasonably had come to base their expectations.

18. This possibility of waiver of rights by custom or practice might explain the Board's obiter comment in *Molson's Brewery*, *supra*, underlined in the above quotation from paragraph 10 of the decision. It is conceivable that, had there been no express management right to determine shift schedules, the remaining evidence might support the conclusion that the shift arrangements which were in effect at the onset of the freeze had, by custom, become a privilege and were protected by section 70. The Board's decision in *The Wellesley Hospital*, [1976]

OLRB Rep. July 364, deals with a situation quite analogous to that illustration and, in finding that the employer's practice of scheduling regular weekly overtime to be a privilege in respect of weekly hours of work, stated:

"We find then that the practice of scheduling overtime work in these circumstances constitutes a term of employment or privilege enjoyed by employees in the bargaining unit. It should be noted as well that the performance of overtime work by the employees constitutes a privilege of the employer. The employees would be in violation of subsection 1 if they refused to work overtime without the consent of the hospital."

The Board's decision went on to comment that "It is not permissible for the hospital in these circumstances to rely on a residual management power to alter the hours of work in face of section 70."

19. In *Wellesley Hospital, supra*, it is obvious that the Board has looked at the evidence before it and found that the legal incidents of the employment relationship at the onset of the freeze included the "privilege" of being scheduled regularly for weekly overtime hours. In the *Molson's Brewery* decision, *supra*, it would be a reasonable inference that the Board, in making its obiter comments, was looking at the possibility that, were there no express management right to determine shift schedules, the schedules prevailing at the start of the freeze might have become a privilege and part of the legal incidents preserved by the freeze. The factual context of those two cases readily distinguishes them from this case.

20. The traditional rights of the employer herein have been modified by the terms and conditions defined in the Manual. Those modifications, however, do not express any limit or prohibition on the contracting out of work. Neither is there any evidence that the employer has by its actions created any limits on its right to contract out work. The issue simply has not arisen and the Board does not conclude from that circumstance that the employer, as a result, had waived what otherwise would have been its normal management right, or created a privilege for employees that their jobs never would be contracted out for *bona fide* business reasons. There can be no doubt from the employer's actions, begun in earnest by April 1979, of examining whether it should revert to contracting out its garbage collection and landfill operations, that it considered such action to be still within the purview of its management rights. While it cannot be said with equal certainty that the employees acknowledged that right, it is not unreasonable to infer that the application for certification was prompted by an apprehended threat to their jobs. Several factors allude to the possibility that the employees may have been aware of the employer's activities and the fact that there was nothing to prevent the employer from transferring the garbage collection and the landfill operations to a contractor. The sequence of events herein, the size of the Community, the public nature of the employer's "business" and its employment relationships and the fact that three other nearby municipalities recently had contracted out similar work all point to the likelihood that the employees suspected what the employer was considering and that they were without any countervailing right to the employer's right to contract out their work. The Board is satisfied, in these circumstances, that the employer had the right before the onset of the freeze to contract out work for *bona fide* business reasons and at least a year prior to the union's campaign, had embarked on the decision making process which led the employer to assert that right during the freeze period. The facts are that, by April 1979, Krammer was engaged actively in evaluating the cost and efficiency of the existing operation and comparing it with

the contracting out alternative. His evaluation developed into a formal proposal to contract out the work when the Committee of the Whole decided on April 22nd, 1980, prior to the freeze, to recommend to Council that the work be contracted out. The proposal led, during the freeze period, to Council ultimately making the decision which is the crux of the matter before the Board. Thus at least a year prior to the union's organization campaign the employer had embarked on a process of asserting a then-existing right to contract out the garbage collection and landfill work, a process which continued uninterrupted until its logical conclusion was reached within the freeze period.

21. The facts in this case establish clearly that, prior to the start of the freeze period, the employer possessed the right to contract out work for *bona fide* business reasons and, in this instance, had progressed substantially towards exercising that right prior to the start of the freeze period. In these circumstances and in the absence of any evidence that the employer was motivated by any anti-union sentiment or by employees having exercised rights under the Act, the Board finds that the employer was exercising the right for *bona fide* business reasons when, during the freeze period, it contracted out its garbage collection and landfill operations and laid off the three grievors. Since employer's rights, like those of employees and unions, are captured by the freeze, (see *AES Data, supra*), the Board is satisfied that the employer's actions herein do not constitute a violation of section 70(1) of the Act.

22. The Board does not find this result to be incompatible with the underlying effect and purpose of section 70 of the Act. Its effect is to preserve the status quo and, as the Board stated in *Burlington Carpet, supra*:

"...part of...[the status quo] is the employer's right to conduct its business as it did before..."

The section's purpose, as stated in *AES Data, supra*,

"...is to maintain the prior pattern of the employment relationship, in its entirety, while parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the status quo..."

That "fixed basis", however, is not a basis free of any and all unilateral change. In its decision in *Spar Aerospace, supra*, the Board declined to interpret section 70 to prohibit any unilateral action at all and, having done so, commented as follows:

"...during the period of the freeze, an interim legal regime is imposed by operation of section 70 as the parties move from the regime of the individual contract of employment to one governed by the terms of a collective agreement. This interim legal regime, in our view, should not place an employer in a legal straitjacket yet it should not at the same time lead to employees perceiving themselves as being penalized for engaging in collective bargaining. These two ends, in this Board's view, are best achieved by interpreting section 70 as requiring the parties to simply conduct business as before."

That decision, joining as it does the Board's refusal to interpret section 70 as a prohibition of



*any unilateral action at all* with its endorsement of the “business as before” view of the section evident in the earlier decisions reviewed in *Spar*, makes it clear that the section 70 freeze is not absolute protection against all change.

23. Any union, employee or employer seeking relief against changes which do not fall within the protection of section 70 must rely, therefore, on those other sections of the Act which are appropriate to deal with unfair labour practices. For example, had there been evidence in the instant case that the changes were motivated by anti-union sentiment on the part of the employer or were a response to the employees having exercised rights under the Act, these sections could have been brought to bear on the situation. In fact, there was neither any evidence nor any allegation in the complaint of such motive.

24. In conclusion, the Board finds that the contracting out of the garbage collection and landfill operations and the lay off of the grievors Sidney Ringwood, Roland Hapwood and Don Freer is not a violation of section 70(1) of *The Labour Relations Act*.

25. For all of these reasons, the complaint is dismissed.

#### **DECISION OF BOARD MEMBER H. SIMON;**

1. The purpose of section 70 is to maintain the status quo so that the parties may bargain from the same position that existed prior to the union’s application for certification. In other words the employees’ working conditions and wages are not to be altered by the employer, except with the consent of the trade union and the employer had the right to manage his business as before.

2. In *Spar Aerospace Products Limited* decision, *supra*, the Board stated:

“The ‘business as before’ approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, . . . The right to manage is maintained, *qualified only by the condition the operation is managed as before.*” [emphasis added]

3. In the *Molson’s* case, *supra*, the Board stated in its decision:

“The right of the employer to initiate any changes which it had not expressly given away may well be limited by the effect of section 70(1).”

To hold otherwise would be to allow an employer to rely on previously unexercised so called residual rights or broadly worded management rights clauses to circumvent the section 70 at will. A similar view was expressed by the Board in the *Wellesley Hospital* decision, *supra*.

4. The Board has held in a number of cases that unless the rights to make changes are specifically spelled out in a collective agreement or were practiced by the employer prior to the freeze coming into effect, the employer is prohibited from initiating such changes. Most of the cases dealt with changes in hours of work, working conditions, or lay offs. In the case before us the work is still available but has been contracted out by the employer and, as a result, is being

done by the employees of another employer. Which in my view makes this a much more serious complaint and should be upheld by the Board.

5. There is no evidence that the application for certification was prompted when the employees found out that the collection of garbage would be contracted out. The evidence is that when Mr. Krammer first talked to the mayor in January 1979 about contracting out some of the work, the answer was negative. The matter was only revived and was placed on the council's agenda, after the union filed its application for certification. Their own lawyer advised them not to deal with the matter at that time.

6. Under the circumstances it is reasonable to conclude that when the employer found out the employees joined a trade union he resurrected the idea of contracting out the collection of garbage and land fill. The fact that the 3 employees laid-off indefinitely were only given three days notice, is a further indication of the discriminatory action by the employer.

7. This is a small bargaining unit. The lay off of these three employees for an indefinite period and the contracting out of the garbage collection and land fill by the municipality during the freeze period will definitely tip the scales in favour of the employer in bargaining for a first agreement. This in my view is contrary to the intent and spirit of section 70 of the Act.

8. For all of the above reasons I would allow the complaint to succeed and order the reinstatement of the three employees to their former positions with full compensation for lost time.

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**2234-79-R Christian Labour Association of Canada, Applicant, v. Frusino Structure Incorporated, Respondent, v. Labourers' Local 183, Intervener.**

**Reconsideration – Board certifying applicant – Evidence of employer statements which possibly influenced four employees into joining union – Whether certification barred by section 12 – Whether Board setting aside certificate on reconsideration**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members D. B. Archer and J. D. Bell.

**APPEARANCES:** *O. V. Gray, D. McAllister and E. Grootenboer for the applicant; Robert M. Steeves and Aldo Saccucci for the respondent; B. Fishbein and L. Casaldo for the intervener.*

**DECISION OF THE BOARD; March 10, 1981**

1. Labourers' International Union of North America, Local 183 ("Local 183") has requested that the Board reconsider its decision of March 17, 1980, wherein it certified the Christian Labour Association of Canada ("CLAC") as the bargaining agent for all carpenters,

carpenters' apprentices, construction labourers and reinforcing rodmen in the employ of the respondent in the Counties of Essex and Kent (i.e. Board Area #1). Local 183 contends that the applicant obtained its membership evidence with the assistance of the respondent, and that accordingly the Board should revoke CLAC's certificate and declare void a subsequent collective agreement entered into between CLAC and the respondent. It should be noted that in File No. 0757-80-R, Local 183 has itself applied to be certified for construction labourers in the employ of the respondent. If the certificate issued to CLAC and the resulting collective agreement are allowed to stand, Local 183's certification application would be untimely.

2. In seeking to set aside the certificate issued to CLAC, Local 183 is relying primarily on the provisions of section 12 of the Act, which state as follows:

The Board shall not certify a trade union if any employer or employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

3. CLAC originally filed its application for certification on February 27, 1980. In support of its application, it filed evidence of membership on behalf of all ten employees in the bargaining unit. The respondent made no reply to the application. The Board forwarded to the respondent for posting at the job site a Form 52, "Notice to Employees of Application for Certification, Construction Industry". Subsequently, CLAC advised the Board that the respondent had failed to post the Form 52 on the job site and in response, the Board mailed a Form 52 directly to each of the bargaining unit employees. The Form 52 indicated to the employees that if they desired to make any representations to the Board in opposition to the application, they were required to so notify the Board by the terminal date, namely, March 10, 1980. No such representations were received. In these circumstances, the Board proceeded to certify CLAC without holding a hearing, which the Board is permitted to do in the construction industry by force of section 91(13) of the Act.

4. Although the job site in question is in Windsor, at the time CLAC applied to the Board to be certified, the respondent employed four individuals whose permanent residences were in Toronto. In support of both its application for certification in File No. 0757-80-R, and the instant request for reconsideration, Local 183, which is a Toronto-based local, filed certificates of membership with respect to three of the four employees from Toronto. These certificates of membership indicate that the three employees were members of Local 183 prior to going to Windsor.

5. The respondent's job in Windsor involved doing the form work for a new apartment building. The General Contractor on the project was identified as Goldie-Burgess, a firm bound to a collective agreement with CLAC. Prior to the events giving rise to these proceedings, CLAC had been certified with respect to the respondent's employees in Board Area #9 and had entered into a collective agreement with the respondent with respect to that area. Mr. A. Saccucci, the owner of the respondent, had at one time also been involved with a firm called Sacro Forming which had been signatory to a collective agreement with CLAC.

6. In preparing the respondent's bid for the forming subcontract on the Windsor job, Mr. Saccucci contacted the office of CLAC in Toronto and obtained the wage rates paid to



employees under CLAC's collective agreements in the Windsor area. As already noted, the general contractor, Goldie-Burgess, was bound to a collective agreement with CLAC. After the respondent received the forming contract, Mr. Saccucci set about hiring the men who would actually be performing the work. Two employees appear to have either been transferred from other operations of the respondent or hired in Windsor for the project. Mr. Saccucci also contacted a Windsor representative of CLAC and asked if the union could supply him with some men. In response to this request, four CLAC members were sent to the site. (Mr. Grootenboer, a representative of CLAC, testified that five CLAC members were sent. However, from a review of the documentary evidence of membership on file and other evidence with respect to the number of employees on the site, we are satisfied that only four CLAC members were sent.) Mr. Saccucci also hired the four individuals from Toronto. One of these four, Mr. D. Guardiani, had heard from a friend that the respondent might be hiring and had contacted Mr. Saccucci. Later, on or about February 13, 1980, Mr. Saccucci asked Mr. Guardiani to meet him at his home and to bring along any others who might be interested in working in Windsor. At the meeting, Mr. Saccucci advised the four men that he wanted them to work for the respondent in Windsor. Mr. Saccucci indicated that they would be paid the CLAC rate for Windsor and he quoted them the rate. With respect to fringe benefits, Mr. Saccucci indicated they would be the same as those contained in the collective agreement between CLAC and Sacro Forming and he read excerpts from this agreement. All four of the men agreed to work for the respondent in Windsor, and they left for the project some three or four days later.

7. There is some dispute as to what, if anything, was said at the meeting about the men having to join CLAC. Mr. Saccucci testified that while he told the men they would receive the CLAC wage rates for Windsor and read from the fringe benefit articles in the CLAC—Sacro Forming collective agreement, he did not tell the men they would have to join CLAC. Counsel for Local 183 called two of the four employees who were at the meeting to testify, namely, Mr. Guardiani and Mr. Girgenti. Mr. Guardiani testified that Mr. Saccucci had made a reference to CLAC when explaining what the men would be paid and had also indicated that the respondent had a collective agreement with CLAC. According to Mr. Guardiani, from these comments on the part of Mr. Saccucci he concluded that he would have to join CLAC to work on the project. The other employee, Mr. Girgenti, testified that he could recall no mention of CLAC at the meeting at Mr. Saccucci's house. From this evidence, we are led to conclude that Mr. Saccucci did not advise the four employees from Toronto that they would have to join CLAC, although on the basis of his references to CLAC the employees may well have gained the impression that the respondent expected that they would become members of CLAC.

8. Some fifteen days after the respondent's employees commenced working on the Windsor job site, they were approached by Mr. E. Grootenboer, a representative of CLAC. Mr. Grootenboer knew that certain CLAC members were working on the job site. Mr. Grootenboer approached the employees who were already members of CLAC and had them sign certificates of membership. Mr. Grootenboer then approached the other employees to get them to sign membership applications for CLAC. We are satisfied that Mr. Grootenboer said nothing improper to any of the employees to get them to sign. All ten of the respondent's employees on the site signed either a certificate of membership or an application for membership. Of the ten, four had been at the meeting at Mr. Saccucci's house.

9. As already indicated, Mr. Grootenboer said nothing improper to the employees to get them to sign. However, Mr. Guardiani, one of the employees from Toronto, testified that

he had signed a membership application for CLAC because he felt that since it was the union on the job, he had to sign if he was to keep working there. The evidence of another Toronto employee, Mr. Girgenti, as to why he signed was unclear, although Mr. Girgenti did twice state that he signed for CLAC "automatically".

10. Local 183 contends that, notwithstanding the lateness of its entry into the proceedings, the Board should reconsider its decision of March 17, 1980 and revoke the certificate issued to CLAC since at the time it was issued CLAC had been barred from being certified by force of section 12 of the Act. Having reviewed all the evidence, however, we are satisfied that CLAC neither sought out management support, nor was it a knowing beneficiary of any such support. Further, while Mr. Saccucci did refer to CLAC when speaking to the four employees at his home, as already indicated, we are satisfied that he did not tell the employees that to be employed in Windsor they had to join CLAC. In our view, there was not present here the type of employer-trade union relationship which section 12 was meant to protect against, and that accordingly section 12 did not bar CLAC's certification.

11. Although this is not a case where section 12 is applicable, because of Mr. Saccucci's comments to them, the four employees who were at Mr. Saccucci's home may have gained the impression that the respondent expected that they would become members of CLAC. This in turn may have influenced these employees into signing for CLAC. In these circumstances, had the matter been raised during the initial certification proceeding, the Board would likely have been concerned about the weight to be given to the membership evidence of the employees spoken to by Mr. Saccucci. However, even if the Board had decided to put no weight at all on the membership evidence relating to these four employees, CLAC would still have filed acceptable evidence of membership relating to six other employees, membership evidence which has not in any way been attacked or challenged by Local 183. At the time, these six employees represented over fifty-five per cent of the employees in the bargaining unit. Accordingly, it appears that the Board would have certified CLAC in any event. This being the case, we are of the view that the Board should not now reconsider and vary its decision of March 17, 1980.

12. In the result, the request for reconsideration is denied.

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**0482-80-R**    **Labourers' International Union of North America,**  
**Local 506, Applicant, v. The Georgian Building Corporation,**  
**Respondent.**

**Bargaining Unit – Charges – Construction Industry – Practice and Procedure – Allegations of union misrepresentation as to its identity and non-pay – Whether Board appointing officer to investigate non-pay allegation – Whether Board adjourning to permit to sub-poena witnesses – Whether Board extending terminal date and having new hearing to permit intervention by union which had notice of hearing – Board following *Pelar Construction decision***

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members H. J. F. Ade and H. Kobryn.

**APPEARANCES:** *Patricia Conway, Ian Roland, Nicola Barbieri, Mike Mihajlovic and Peter Hitchen for the applicant; Gary Walker, Alan Franklin and Tony Maida for the respondent.*

**DECISION OF THE BOARD; March 27, 1981**

1.            The name: "The Georgian Group" appearing in the style of cause of this application as the name of the respondent is amended to read: "The Georgian Building Corporation."
2.            In this application for certification the applicant filed four combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed a duly completed Form 54, Declaration Concerning Membership Documents, Construction Industry.
3.            The respondent filed a reply and a list of employees containing four names on Schedule A, but failed to file specimen signatures.
4.            By letter dated June 13, 1980, counsel for the respondent advised the Board as follows:

"I suspect and have some evidence of improper activities by the representatives of Local 506. I am prepared to lead evidence to prove this allegation."

By letter dated July 29, 1980, counsel for the respondent further advised the Board as follows:

"... I wish to bring to the Board's attention and to notify you that there appears to have been some improper behaviour when they attempted to organize the employees working on the project. The particulars of this improper behaviour are as follows:

- (i)    The representative of Local 506 misrepresented the Union that they represented. The employees thought the representatives belonged to Labourer's Local 183;



(ii) The employees thought they were signing proof of membership cards for Local 183;

(iii) The union representative did not collect the required \$1.00

In view of the above I will be requesting the Board to appoint an officer to investigate these allegations."

By letter dated July 31, 1980, delivered to counsel for the respondent, the Deputy Registrar of the Board replied to that letter as follows:

"Receipt is acknowledged of your letter of July 29th, 1980, in the above matter, a copy of which has been forwarded to the applicant herein for its information, and your attention is drawn to Section 47 of the Board's Rules of Procedure.

With respect to section one and two of your letters, the Board does not carry out an investigation in respect to the matters raised and it is up to you to raise them at the hearing and be prepared to provide the proof thereto.

With respect to section three, the Board would require further particulars as to the specific person or persons whom you are alleging did not pay the required dollar, before the Board could carry out such an investigation."

5. The parties were duly notified by Form 53, Notice of Hearing, Construction Industry that the Board had directed that a hearing be held on August 1, 1980 at the Boardroom, 400 University Avenue, Toronto, commencing at 9:30 o'clock in the forenoon (E.D.T.) for the purpose of hearing the evidence and the representations of the parties with respect to all matters arising out of and incidental to the application including the description of the bargaining unit and the respondent's contention that it is a holding company without any employees within the applied for bargaining unit. At the hearing, counsel for the respondent indicated that his client intended to proceed with all of the allegations set forth in his letter of July 29, 1980. After providing the Board with the name of the employee from whom the representative of the applicant allegedly failed to collect the required \$1.00, counsel repeated his request that a Board Officer be appointed to investigate the non-pay allegation. He further requested that the hearing be adjourned for one week to enable the respondent to subpoena witnesses to testify concerning the two other allegations contained in his letter of July 29, 1980.

6. Counsel for the applicant submitted that the Board should refuse to hear evidence concerning any of the allegations set forth in the aforementioned letter of July 29, 1980, as the respondent had failed to promptly file notice of intention to allege, at the hearing of the application, improper or irregular conduct as required by Rule 47. In support of this submission, counsel noted that the letter was dated only two days prior to the hearing and did not particularize the alleged improper or irregular conduct. In the alternative, counsel contended that if the Board were to permit evidence to be adduced in support of the allegations, the adjournment requested by counsel for the respondent should be denied in order to avoid prejudice to the applicant as a result of delay. However, she reserved the right to

request an adjournment in the event that the applicant was surprised by any of the evidence adduced by the respondent, in view of the lack of particularity.

7. After recessing to consider the submissions of the parties, a panel of the Board consisting of Vice-Chairman R. D. Howe and Board Members C. A. Ballentine and E. C. Went, made the following ruling at the hearing on August 1, 1980:

“Having regard to the submissions of the parties, the Board, in the exercise of its discretion under Rule 47(2) is prepared to permit the respondent to adduce evidence at the hearing today in support of the allegations set forth in paragraphs (i) and (ii) of counsel’s letter dated July 29, 1980. However, in view of the lack of particularity concerning these charges, this ruling is without prejudice to the right of counsel for the applicant to request an adjournment during the course of the proceedings if she is taken by surprise. However, we are not prepared to adjourn the hearing as requested by the respondent. Counsel for the respondent had some evidence of the alleged misconduct concerning (i) and (ii) as early as June 13, 1980. By Tuesday, July 29, 1980, counsel by his own admission was aware of the alleged incidents of misconduct. We are not satisfied that he could not, by the exercise of due diligence, have obtained and served the necessary subpoenas in time for the witnesses to be present at the hearing today. Merely writing to the Board to request the Board to appoint an officer to investigate the allegations is not sufficient because counsel knew or should have known that the matters raised in (i) and (ii) are not the type of matters with respect to which the Board carries out an investigation, but rather are the type of matters which the parties must be prepared to prove at the hearing held for the purpose of hearing all the evidence and representations with respect to all matters arising out of and incidental to the application. With respect to the allegation of non-payment of \$1.00, the Board will appoint an examiner to question those involved. If the statements obtained by the examiner indicate irregularity, the Board will schedule a hearing and subpoena witnesses. If the statements obtained do not indicate irregularity, the Board will dispose of this application without a further hearing. We are adopting this procedure concerning allegation (iii) because this charge involves a matter of alleged fraud on the Board.”

8. Since the respondent did not adduce any evidence in support of allegations (i) and (ii) contained in his letter of July 29, 1980, the Board finds that those allegations have not been substantiated.

9. The signed statement obtained by the Board Officer from the individual from whom the representative of the applicant allegedly failed to collect \$1.00, indicates no irregularity. Accordingly, the Board will dispose of this matter in accordance with its usual practice as set forth in the ruling quoted above.

10. By letter dated August 12, 1980, counsel for Labourers’ International Union of North America, Local 183 (hereinafter referred to as “Local 183”) advised the Board that his client desired to intervene in these proceedings “as bargaining agent of the employees affected

by the Application” and “as the representative of the employees affected by the Application”. He requested that the terminal date be extended and that the Board schedule a new hearing date in order to hear this matter *de novo*. In the alternative, he requested an opportunity to file written submissions with respect to “the impact of Bills 204 and 73 on the Certificate, if any, the Board would issue.”

11. After the considering the representations of counsel for Local 183, the Board endorsed the file as follows:

“In view of the fact that Local 183 was notified of this application by Notice of Application, Construction Industry, dated June 5th, 1980, the Board is not prepared to extend the terminal date or hear this matter *de novo*. However, in accordance with your request, copies of the written submissions filed in respect to this matter are enclosed. The Board will be prepared to accept your written submissions on behalf of Local 183 provided that they are filed with the Board on or before Friday, August 29th, 1980. A copy of the collective agreement referred to in paragraph (a) of your letter of August 12th, 1980, may also be filed with the Board if you claim that it grants bargaining rights to Local 183 which are more extensive than those granted to your client by the Certificate dated December 28th, 1977 in Board File No. 1381-77-R.”

By letter dated August 21, 1980, the Registrar notified counsel for Local 183 of this endorsement.

12. By letter dated August 29, 1980, counsel for Local 183 requested the Board to reconsider its decision not to extend the terminal date and not to hear this matter *de novo*. The letter also contained representations with respect to the appropriate bargaining unit in this application.

13. A hearing was scheduled for December 5, 1980 for the following purposes:

“to hear the evidence and representations with respect to the request by Labourers’ International Union of North America, Local 183 that it be permitted to intervene in these proceedings and that the Board reconsider its decision not to extend the terminal date and not to hear this matter *de novo*; with respect to the allegation by Local 183 that at least two of the employees engaged at the time the Application was made did not receive any notice of the Application; and with respect to all other matters arising out of and incidental to the application, including the appropriate unit(s) of employees and the certificates to be issued by the Board having regard generally to the provisions of *The Labour Relations Act* and in particular to the provisions of section 131a of *The Labour Relations Act*.”

That hearing was subsequently adjourned to March 9, 1981.

14. By letter dated March 6, 1981, counsel for Local 183 advised the Board as follows:



"Please be advised that Labourers' Local 183 withdraws its request that the Board reconsider its decision not to extend the terminal date and not to hear this matter *de novo*.

Accordingly, Labourers' Local 183 does not intend to appear at the hearing in the above matter, now scheduled for March 9, 1981."

In view of that letter, it is unnecessary for the Board to reconsider its decision not to extend the terminal date and not to hear this matter *de novo*.

15. The applicant seeks to be certified as the bargaining agent for all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

16. Having regard to all the evidence before it and the submissions of the parties, the Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 127(1) of the act on September 6, 1978, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council.

17. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act* and is an application made pursuant to section 131a(1) of the Act.

18. Section 131a of *The Labour Relations Act* provides:

"(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause e of section 106 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency, on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

(2) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade unions on whose behalf the application is brought or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargain-

ing unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(3) Notwithstanding subsection 1 of section 108, a trade union represented by an employee bargaining agency may bring an application for certification in relation in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

(4) A voluntary recognition agreement in so far as it relates to the industrial, commercial and institutional sector of the construction industry shall be between an employer on the one hand and either,

- (a) an employee bargaining agency;
- (b) one or more affiliated bargaining agents represented by an employee bargaining agency; or
- (c) a council of trade unions on behalf of one or more affiliated bargaining agents affiliated with the council of trade unions,

on the other hand, and shall be deemed to be on behalf of all the affiliated bargaining agents of the employee bargaining agency and the defined bargaining unit in the agreement shall include those employees who would be bound by a provincial agreement.

(5) Notwithstanding subsections 1 and 4, a trade union that is not represented by a designated or certified employee bargaining agency may bring an application for certification or enter into a voluntary recognition agreement on its own behalf."

19. Counsel for the respondent filed with the Board a collective agreement dated October 23, 1979 between The Ontario Form Work Association and The Form Work Council of Ontario. He contended that this agreement (which provides that it shall be effective from June 4, 1979 to April 30, 1981, and from year to year thereafter in the absence of notice of termination or proposed revision) gave bargaining rights to Local 183 (through The Form Work Council of Ontario) for construction employees (including form builders, reinforced concrete workers, form helpers, working foremen and lay-out men) employed by the respondent in Board Area #8.

20. There was also filed in this matter a collective agreement dated March 1, 1980 between the respondent and Local 183 (effective from March 1, 1980 until May 1, 1981, and from year to year thereafter in the absence of notice of termination or proposed revision) which contains the following recognition clause:

"The Employer recognizes the Union as the exclusive Bargaining Agent for all of its own construction employees engaged in all aspects of residential construction including, but not limited to, all types of

apartment buildings and their natural amenities, and any and all types of housing for those work classification falls into a category listed in Schedule 'A' Item 6, attached hereto, while working within the following areas:

Geographical Area No. 8, established and used by the Ontario Labour Relations Board in matters of Certification, (Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario), and the County of Simcoe."

21. Counsel for the respondent argued that since Local 183 has bargaining rights for some of the construction labourers of the respondent in Board Area #8 pursuant to subsisting collective agreements, Local 506 cannot apply under section 131a(1) for a unit which includes all employees who would be bound by a provincial agreement together with *all* other employees in Board Area #8. He further argued that neither of the exceptions specified in that subsection ("unless such bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition") was applicable in the instant case. Accordingly, he submitted that no certificate could be issued to the applicant in the present case. It was his position that a province-wide certificate in respect of the respondent's employees in the industrial, commercial and institutional sector could only be obtained through a section 131a(1) application pertaining to an "appropriate geographic area" in which no bargaining rights had previously been obtained by any trade union in respect of any of the respondent's employees in any of the other sectors in that geographic area (unless bargaining rights had been obtained for all employees in all other sectors in that area by voluntary recognition or by certificate issued under section 131a(3)). In the alternative, he submitted that the Board should issue a certificate only in respect of the respondent's employees in the industrial, commercial and institutional sector (province wide).

22. Counsel for the applicant contended that the Board should not construe section 131a of the Act in a manner which could preclude some of the employees of an employer in a Board area from ever being represented by a trade union through a certification application. He noted that if the respondent's interpretation of section 131a were accepted, the Board could not certify where an employer employs persons in the industrial, commercial and institutional sector and in other sectors in a Board area and a trade union holds bargaining rights in some but not all other sectors. Thus, (he submitted) the employees in the remaining sectors would "remain forever unrepresented" (unless the employer granted voluntary recognition with respect to them). He submitted that the bargaining rights currently held by Local 183 (in respect of employees of the respondent in Board Area #8) under existing collective agreements should be treated as either having been acquired by voluntary recognition (since the recognition clause in a collective agreement supersedes any certificate issued by the Board) or should be "deemed" to have been acquired under section 131a(3) since it is the provision under which Local 183 would have obtained bargaining rights if that subsection had been in force at the time Local 183 was certified in respect of them. Accordingly, he requested the Board to issue a certificate in respect of all construction labourers of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.



23. A series of cases involving the certification of Local 183 or Local 506 was recently heard by a five-man panel of this Board. In *Pelar Construction* [1981] OLRB Rep. Feb. 210 which was one of the cases in that series, the Board reviewed its historical treatment of certification applications filed by those two locals and the impact of section 131a thereon. The Board concluded:

“18. . . . In view of the foregoing reasons, therefore, we are of the view that both Local 506 and Local 183 are entitled at their option to apply under either subsection 1 or subsection 3 of section 131a. In such applications, the Board will follow the mandatory directives of the relevant subsections.

19. In this regard, we should like to emphasize the approach the Board has taken to the certificates granted by virtue of subsection 2. Where an application has been made under subsection 1 and the appropriate unit of employees is found to include employees in the industrial, commercial and institutional sector throughout the province and employees in sectors other than the industrial, commercial and institutional sector in a local geographic area, the Act directs the Board to issue two certificates. Subsection 1 indicates that such an application is ‘on behalf of all affiliated bargaining agents in the employee bargaining agency’. Thus, the Board issues one certificate to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents in the employee bargaining agency with respect to employees in the industrial, commercial and institutional sector in the Province of Ontario. The second certificate is issued to the applicant for sectors other than the industrial, commercial and institutional sector in the appropriate geographic area. Thus, in the present circumstances regardless of which local either 183 or 506 applies under subsection 1, the applicant is certified on its own behalf and on behalf of the other affiliated bargaining agents in the employee bargaining agency for the industrial, commercial and institutional sector. That is to say, Local 506 is certified on behalf of Local 183 amongst others, and Local 183 is certified on behalf of Local 506 amongst others in relation to the industrial, commercial and institutional sector of the construction industry.

20. If the application is made under section 131a(1) with respect to sectors other than the industrial, commercial and institutional sector, then the applicant will be certified in Board Geographic Area #8 for all sectors other than the industrial, commercial and institutional sector. A number of these sectors have been traditionally within the jurisdiction of Local 183. However, at the hearing in this matter counsel for Local 183 recognized that this was the consequence of the position taken by Local 183 and, did not urge the Board to take any other position with respect to these other sectors. In our view it is clear that in the near future both Locals are going to have to make some accommodation with each other in order to deal with this situation.”

24. Although both the applicant and the respondent submitted that the Board should issue only one certificate (i.e., a province-wide industrial, commercial and institutional sector certificate), section 131a requires the Board to issue two certificates in the instant case. As noted by the Board in *Colonist Homes Ltd.* [1980] OLRB Rep. Dec. 1729, section 131a “requires that a bargaining unit relating to the industrial, commercial and institutional sector also encompass all other sectors in an appropriate geographic area unless the bargaining rights for the area have already been acquired.” In the present case, bargaining rights for all sectors in Board Area #8 other than the industrial, commercial and institutional sector have not already been acquired; only bargaining rights for the residential sector have already been acquired (by Local 183). Accordingly, the Board finds that bargaining rights in all sectors in Board Area #8 other than the industrial, commercial and institutional sector have not “already been acquired under subsection 3 or by voluntary recognition” within the meaning of section 131a(1).

25. In interpreting section 131a, the Board must have regard to *The Interpretation Act*, R.S.O. 1970, c. 225. Of particular significance in the present case are the following sections:

“8. The preamble of an Act shall be deemed a part thereof and is intended to assist in explaining the purport and object of the Act.

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of anything that seems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.”

The preamble to *The Labour Relations Act* provides as follows:

“Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.”

Having regard to those legislative provisions, the Board cannot accept the construction of section 131a advocated by counsel for the respondent. Harmonious relations between employers and employees would not be furthered, nor would the practice and procedure of collective bargaining be encouraged by that construction which would preclude certification in respect of some employees who would not otherwise be beyond the purview of the certification procedures under the Act. Such an interpretation might well result in a resurgence of recognition strikes, the elimination of which is one of the purposes of the certification procedures of the Act. The Board has a well-known and long standing practice of preserving existing bargaining rights by excluding from bargaining units employees covered by subsisting collective agreements. In the absence of a clear and specific legislative direction to the contrary, the Board is of the view that it is appropriate, having regard to the preamble and the general scheme of the Act, to maintain that practice which promotes industrial peace and stability by recognizing and preserving existing bargaining rights. (Employees covered by subsisting Board certificates and subsisting written voluntary recognition agreements should

also be excluded to preserve any such additional bargaining rights which might be in existence.)

26. For the foregoing reasons, the Board finds pursuant to section 131a(1) that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements, certificates of The Labour Relations Board or written voluntary recognition agreements, constitute a unit of employees of the respondent appropriate for collective bargaining.

27. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 11, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

28. Section 131a(2) of the Act, as set forth above, provides for the issuance of more than one certificate if the applicant has the requisite membership support. Therefore, pursuant to section 131a(2), a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements, certificates of The Labour Relations Board or written voluntary recognition agreements.

29. Further, pursuant to section 131a(2), a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by subsisting collective agreements, certificates of The Labour Relations Board or written voluntary recognition agreements.

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**1500-80-R United Food and Commercial Workers International Union, Local Unions 175 and 633, Applicant, v. The Great Atlantic & Pacific Company of Canada Limited, A & P Drug Mart Limited, Respondents.**

Related Employer–Store carrying on pharmacy departments through wholly owned subsidiary–Whether subsidiary related employer–Relevancy of wishes of employees of related employer considered–Whether union seeking certification in guise of section 1(4), application objectionable–Whether failure to exercise due diligence in making application

**BEFORE:** R.O. MacDowell, Vice-Chairman, and Board Members B. Armstrong and C.G. Bourne.

**APPEARANCES:** *H. Caley for the applicant; J.A. Roffey, D. Churchill-Smith, Q.C. for the respondent.*

**DECISION OF THE BOARD;** March 27, 1981

I

1. This is an application under section 1(4) of *The Labour Relations Act*, involving Local 175 of the Canadian Food and Allied Workers' Union ("the union:), and a number of companies which might be loosely described as the "A & P corporate family". This corporate organization includes: a "parent" or "holding" company known as The Great Atlantic & Pacific Tea Company Limited; an "operating" company known as The Great Atlantic & Pacific Company of Canada Limited; a real estate arm known as A & P Properties Limited; and a drug company known as A & P Drug Mart Limited. The entities directly affected by these proceedings are the Canadian operating company, and the drug company. These will hereinafter be referred to as "A & P", and "the Drug Company", respectively. Section 1(4) of the Act reads as follows:

1.-(4) Where in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

2. The applicant union is the bargaining agent for some fifty-two hundred employees of A & P working in approximately one hundred stores in various locations in Ontario. The union and A & P are bound by a collective agreement, which recognizes the union as:

"the exclusive bargaining agent for all employees of the Company *in its Retail Stores* located in the Province of Ontario, save and except Assistant Store Managers, persons above the rank of Assistant Store

Manager, Meat Department employees, persons regularly employed for not more than twenty-four (24) hours per week and students employed in off school hours and during the school vacation period.”

This recognition provision is supplemented by a letter of understanding signed by a representative of both parties and reading as follows:

“This will confirm the understanding reached by the parties during negotiations with respect to the currency of the Collective Agreement dated the 18th day of January, 1979, relating to the following.

The parties agree that Pharmacists in the employ of the Company will be excluded from the Collective Agreement.”

3. The present application affects approximately five employees, described as “pharmacy assistants” or “assistant pharmacists”, employed in what the parties refer to as A & P’s “super stores”. There is no dispute that these “super stores” are considered to be “retail stores” within the meaning of the parties’ collective agreement. A “super store”, as its name suggests, is much larger than an ordinary retail food store, and provides the public with a greater range of goods and services. A super store may employ as many as one hundred and forty employees and, in addition to having a meat, produce, grocery and health and beauty aid department, may include a snack bar, bakery, “deli”, general merchandise department, service centre, and pharmacy. As in the case of smaller stores, each department occupies a separate area of the store, and is identified by appropriate signs and colour coded labelling. The feature which gives rise to the present application is that the pharmacy aspect of the A & P business is carried on through a separate corporate entity known as A & P Drug Mart Limited – an entity which was described at the hearing as a wholly owned subsidiary.

4. An examination of the ownership and operations of the two companies (i.e. A & P and the Drug Company) demonstrates, beyond doubt, that they are engaged in related activities or businesses under common control and direction. F.C. Kennedy and R.W. James are the president, and secretary-treasurer, (respectively) of both companies. The Drug Company has no other officers. Samuel Hirsch, the general manager of the Drug Company since 1976, was hired by Kennedy, reports to him, and operates the drug business within the financial mandate established by A & P. Hirsch is a director, but not an officer of the Drug Company; and his status as a director is directly related to section 141 of *The Health Disciplines Act*, which requires that pharmacists must make up a majority of the directors of any company operating a pharmacy. It is clear that it is Kennedy and A & P who have ultimate control over the economic destiny of the Drug Company. The evidence before the Board is that all of the shares of the Drug Company are owned by The Great Atlantic & Pacific Tea Company Limited – the general holding company which controls the A & P Corporate family.

5. The offices of the Drug Company are located in the A & P complex. Hirsch testified that there is no lease and no rent paid. The Drug Company hopes to move to new premises on Vickers Road. The property and premises located there are also owned by A & P.

6. Hirsch is the only employee of the Drug Company who is not directly involved in retail sales. From his office in the A & P complex, he monitors the performance of the Drug Company, but he has no technical or clerical employees to assist him. An employee of A & P

prepares the payroll, and maintains such personnel records as may be required. Similarly, clerical assistance respecting invoicing, etc., is provided by an A & P employee using A & P invoicing forms and inter-store documentation as much as possible. Hirsch testified that cheque signing authority for the Drug Company is vested in an employee of A & P — although he was uncertain about to whom she reported, and did not even know the name of the employee currently fulfilling this role. Payroll cheques, documentation, or other communications respecting the Drug Company, are transmitted to the super stores in which pharmacies are operated, by means of the internal A & P mail.

7. There is substantial integration and sharing of services between the two companies. Superficially, there is little to distinguish the Drug Mart from any other department of a super store. The pharmacy occupies a defined area within the super store lay-out, and is identified by signs in much the same way as any other department. The pharmacy makes use of the A & P logo and colour scheme. Pharmacy advertisements appear as part of the A & P block of “ads” appearing in daily newspapers or circulars; and there was no evidence that the Drug Company had to pay for this service. As in the case of its office space, the area occupied by the pharmacy is “rented” from A & P; but there is no lease or written agreement and the Drug Company’s “charge-back” is calculated on a monthly basis depending on its sales.

8. The hours of the pharmacy are somewhat different from those of other departments in the super store, and a portion of its area can be enclosed and locked to protect the pharmacy’s stock of restricted drugs; however, the pharmacy may also have separate display islands from which customers can select products in the course of their shopping, for presentation at the main cash register. The employees of the pharmacy have a distinct dress and colour scheme, and the price stickers appearing on the products also have a distinct colour; but this is also the case with other departments in the super store.

9. The functions of the “pharmacy assistants” working in the Drug Mart are not unlike those of a stock clerk in the other departments of the super store — although, their hours are somewhat different, they do not punch time cards, and they are paid separately. These employees perform minor clerical functions under the supervision of the pharmacist, fill out forms, provide customer information, do pricing and shelving, and operate the cash register. No specialized training is required to carry on these duties. Mr. Hirsch was not sure whether their benefits (life insurance, health insurance, dental plan, etc.) were similar to those of the employees of A & P, however, it is clear that the dental plan forms, at least, are the same. The wages paid to these “pharmacy assistants” are substantially below those paid to the stock clerks performing similar duties in other parts of the store. It was this wage disparity which apparently brought the existence of the pharmacy assistants to the union’s attention.

10. The range of products provided by the pharmacy are not the same as would be provided by an entirely independent entity. A & P and the Drug Company coordinate their product lines, so as to ensure no overlap with the products sold in other A & P departments. As an example, Hirsch testified that the pharmacy did not carry “Aspirin” since that item is available through the “grocery store”. Similarly, the pharmacy does not handle the range of health and beauty aids which would be available in an ordinary independent operation because these are already provided by A & P. Such products as the Drug Company does sell, it purchases direct from its own suppliers. However, except for restricted drugs which the pharmacists handles directly, bulk products are processed through the shipping/receiving



area of the main store; and, as we have already mentioned the invoicing and paper-work are done at the A & P offices, by A & P employees using A & P forms where possible.

11. The Board heard considerable evidence concerning the handling of the Drug Company's receipts, and its use of the cash registers and cashier provided by the main store. As we have noted above, a super store has identifiable price stickers for each department. In the case of the pharmacy, these stickers are purple or buff in colour, and bear the words "A & P Pharmacy" or "A & P Drug Mart". (The purple stickers denote products which require the initials of a pharmacist to authorize a purchase.) The main store cash registers serve all departments, and there is a specific button or "key" for the pharmacy — as there is for the produce department, meat department, etc. A significant portion of the sales of the Drug Company are processed through the main cash registers. (Interestingly enough, this contrasts with the snack bar, where A & P has made a specific effort to ensure that purchases are recorded at the cash register within the department.) All of the cash registers are "on line", and linked by computer to the general office of the super store. The computer provides a daily report on the sales in each department, and the proportion of the total sales attributable to each department. In both cases, the pharmacy is included and treated as a department of the main store. In the event of a computer breakdown, sales are pro-rated per department — again including the pharmacy.

12. Each morning the store cashier dispenses a cash float to the pharmacy and at the end of the day determines a cash balance. If the sums recorded do not balance, the cashier will check the "detail tape" in the cash register itself. The key to the cash register is kept by the head cashier and the store manager — not the pharmacist operating the Drug Mart. Cash receipts from the Drug Mart are mingled with the funds from other departments, given to Brinks Express, and deposited on a daily basis in the A & P bank account. It is only at the end of the week that there is a reconciliation, and a transfer of funds to the separate bank account maintained by A & P Drug Mart Limited.

## II

13. The criteria relevant to a "related employer" determination were succinctly set out by the Board a decade ago in *Walters Lithographing Company Limited*, [1971] OLRB Rep. July 406, at paragraph 21:

"21. The indicia or criteria which the Board considers relevant in making a determination as to whether the activities or businesses of one or more corporations, individuals, firms, syndicates or associations, or any combination thereof are carried on under common direction and control and therefore may be treated as one employer are — (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. No single criterion is likely to decide the issue. Rather, as has been stated, the Board's determination undoubtedly will be based on an appraisal of all of them in the light of the particular facts before it. It hardly need be said that in applying the above criteria, the greater the degree of functional coherence and interdependence which the Board finds among the associated or related activities and businesses the more probable it is that

the Board will conclude that the entities carrying on these activities should be treated as one employer. We would mention here also that the indicia or criteria themselves obviously overlap. For that reason, in applying them to the facts of the instant case we have not attempted to deal with each criterion on an individual basis.”

Applying those criteria to the facts present here, there is really no doubt that A & P, and the Drug Company, carry on related activities or businesses under common control or direction. Indeed, the reality of the situation is that, what might otherwise have been merely another department in the super store, must, because of regulatory legislation, be carried on through a separate corporate entity. The real question before the Board is not whether A & P and the Drug Company are “related employers”, but whether the Board should exercise its discretion to so declare.

14. Counsel for A & P and the Drug Company (which were not separately represented) contends that the Board should not exercise its discretion to declare that the two companies are related employers because the applicant has not exercised “due diligence” in bringing this application, and that the union should not be permitted to use section 1(4) as a “substitute for certification”. It is not disputed that the union has made no attempt to organize the five employees potentially affected by this application; (although it might also be noted that these employees have not sought to intervene in this matter, and, in consequence, the Board has no direct evidence concerning their wishes).

15. We have considered the respondents’ arguments with respect to “foisting” a union upon a group of employees who may not wish to be represented; however, we do not think that the wishes of the employees are the only, or even the predominant, factor to be considered in a section 1(4) application. If such were the case, the very erosion of bargaining rights which triggered the proceeding, (and which section 1(4) was designed to cure) could be raised as a bar. It is entirely typical that the employees of a related company will not be union members, for it is the creation of job opportunities ostensibly beyond the scope of the collective agreement, which constitutes the “erosion” of the union’s bargaining rights. But for the creation of a separate vehicle, the work opportunities associated with the related business activity, and the conditions of employment of the employees engaged in that activity, would be regulated by the collective agreement. The very purpose of section 1(4) is to ensure that the union’s bargaining rights and the scope of the collective agreement will not be restricted simply because an employer chooses to expand through a new corporate vehicle rather than its existing one. Nor do we think we can attach much significance to the fact that upon learning of the existence of a related employer, a union opts to utilize section 1(4) rather than apply for certification. The statute contemplates both types of application, and if the circumstances are such that section 1(4) can be applied, we do not consider it a proper exercise of our discretion to raise a bar simply because a union might have applied for certification. Indeed, if the two corporate entities otherwise satisfy the requirements of section 1(4), there are good labour relations reasons for making a section 1(4) order so that the collective bargaining structure will accord with the economic and industrial relations reality.

16. We turn then, to the respondents’ contention that the union did not exercise due diligence in bringing this application.

17. The collective agreement between the union and A & P recognizes the former as the



exclusive bargaining agent for all employees of the company in its retail stores located in the province of Ontario. In or about 1977, the possibility of employing pharmacists within the bargaining unit arose, and as a result of the discussions between the parties, the above-mentioned "letter of intent" excluding pharmacists was concluded. This letter of intent was embodied into the 1978 collective agreement and remains in force in the current agreement. It is the union's position — a not unreasonable one in the circumstances — that the letter of intent when read with the general recognition clause, contemplates the operation of a retail pharmacy within the context of A & P's retail stores, but ensures that the professional pharmacists employed therein will not fall within the scope of the union's bargaining rights or the collective agreement. This, the union argues, suggests that employees other than pharmacists will fall within the bargaining unit description, if the pharmacy is operated as a department within the physical confines of a retail store. The union argues that to take any other view would be to ignore the plain meaning, intent, and implication of the recognition clause and the letter of intent. It was an attempt to advance this position which ultimately led to the present application.

18. There are five super stores in Ontario which have drug marts on the premises. The London store opened in August 1977. A full-time pharmacy assistant was hired four to six months later, but left after about six months, leaving the outlet in the hands of pharmacists. A pharmacy assistant was not rehired at the London store until April 30, 1979. The Hamilton store opened in November 1978 and did not hire a pharmacy assistant until March 1979. Pharmacy assistants were also hired at various locations on October 11, 1979, November 27, 1979, December 1979, April 1980, and January 1981. The hours of these pharmacy assistants vary, depending upon the volume of business and the presence of pharmacists. Some of them are part-time and some are full-time. Their shifts are somewhat different to those of other employees. Typically, there has been only one pharmacy assistant in each super store, and there was nothing overt to alert the union either to the fact that A & P was not applying the agreement to them, or that the Drug Mart was operated through a separate corporate entity. Jim Crockett, a business agent for the union, testified that inquiries were made about the status of pharmacy assistants after one was hired at the London store, but by the time the question was raised, the London operation no longer employed such person, and the union had no reason until much later to suspect that there had been any alteration in the status quo. The union, of course, was operating under the assumption that if persons other than pharmacists were hired, they would fall within the scope of the collective agreement; while A & P neither accepted this position, nor made any effort to notify the union when such individuals were hired.

19. The existence of pharmacy assistants to whom the agreement was not being applied, was brought to the attention of the union by a grievance filed on April 25, 1979 respecting the Hamilton location. This grievance alleged that a "part-time assistant pharmacist" was doing bargaining unit work, and, it will be observed, was filed less than a month after that individual was hired. Subsequently, grievances were filed in respect of the London location and one or two others. It cannot be said that the union "sat on its rights" or failed to take steps to protect its position when it learned that circumstances existed which might constitute a breach of the collective agreement. Moreover, in the replies to these grievances, A & P at no time questioned the arbitrability of the grievances, or alerted the union to the fact that the Drug Mart was operated by a separate corporate entity which, in the absence of a section 1(4) declaration, would not as a matter of law be bound by the parties' collective agreement. These grievances



were processed through the various steps of the grievance procedure without any such indication and, since they remained unresolved, were scheduled for arbitration.

20. On December 13, 1979, the parties met to discuss the problem. At this meeting those present were: Mr. Hirsch (who told the Board he had no idea that the meeting was dealing with a specific grievance and knew nothing about the collective agreement), Tom Zakrzewski, manager of industrial relations for A & P, Leo Cassaday, A & P's vice-president of personnel, W. Hanley, president of the union, and Jim Crockett, one of its business agents. The focus of that meeting was the duties of the pharmacy assistants. The parties discussed whether they performed work similar to stock clerks or, alternatively, whether their functions were of a specialized nature so as to bring them within the exclusion contemplated by the letter of understanding. It is contended that, as a result of this discussion, the union should have been aware of the existence of a separate corporate entity operating the pharmacies in the super stores; however, having heard the way in which various witnesses — including the respondents' witnesses — have described the operation, it is easy to see why the union might not have reached that conclusion.

21. Crockett recalls that Hirsch was introduced as the "manager of the drug stores" and the witnesses referred to the operation of A & P Drug Mart Limited as "the drug mart", "the pharmacies", "the drug stores", "the drug operation". There may well have been references to "the Drug Company" and there is no doubt that A & P took the position that the Drug Mart was a separate operation whose employees perform different job functions than stock clerks; however, we are satisfied that neither A & P nor A & P Drug Mart Limited emphasized the separate legal identity of the pharmacy operation or challenged the arbitrability of the grievance on this basis. Indeed, it is difficult to understand why the parties would spend so much time discussing the duties and responsibilities of the pharmacy assistants (see exhibit 11 which was extensively reviewed at the meeting) if the basis of the Company's position was that the grievance was not arbitrable because of the separate legal identity of the Drug Company. We also accept the evidence of Jim Crockett that A & P suggested that the union accept a different and lower schedule of wage rates, in return for which A & P would voluntarily recognize the union for operations in which it might engage outside the physical confines of a general grocery store. Again, it is difficult to relate this evidence to the respondents' current assertion that A & P and the Drug Company are entirely separate. The very suggestion that such compromise might be made, and that a separate wage schedule might be agreed upon, obscures the legal distinction between the two entities and goes a long way to explain why the union might not have recognized that distinction. Finally, as we have already mentioned, the union did not compromise its grievances or accede to A & P's suggested settlement. Indeed, Tom Zakrzewski testified that he believed the union filed further grievances after the December 13th meeting when it discovered that the pharmacies in other super stores also employed pharmacy assistants on a full-time or part-time basis. This conduct is consistent with the evidence of Crockett that the union did not discover the separate corporate identity of A & P Drug Mart Limited until much later.

22. In early June 1980, counsel for A & P notified counsel for the union that there would be an objection to arbitrability based upon the separate legal identity of the Drug Company. In follow-up discussions, counsel for the union ascertained the nature of this objection and a corporate search confirmed that, indeed, A & P Drug Mart Limited was a separate corporate entity. We are satisfied that this is the first time that the union actually became aware of the separate legal identity of A & P Drug Mart Limited, and it is only at this

point that its view of the problem changed from one involving a simple (alleged) breach of the agreement, to one involving the potential application of section 1(4). Thereafter, the parties engaged in certain discussions with a view to resolving the outstanding issues and when those broke down, the union made the current application.

23. The respondents contend that the union should have been aware earlier of the separate corporate existence of A & P Drug Mart Limited and should have made its 1(4) application earlier. In the respondents' submission, the union's unreasonable delay in discovering and acting upon that fact should now deprive it of the remedy available under section 1(4). The Board cannot accept that contention. The circumstances were such that the union could not reasonably have been aware that two or three employees of the more than five thousand which it represents were not being treated in accordance with the collective agreement, and immediately upon the union becoming so aware it filed grievances to protect its position. There may be no legal requirement for a company to advise a trade union about a related company which might affect the union's bargaining rights, and there may be no requirement that a company which intends to rely upon "the corporate veil" as a defence to a grievance should disclose that defence, however, it is inconsistent, in our view, for a company to take the position that the union "ought to have known" of these matters, when in response to the grievance, the Company itself did not clearly notify the union of the facts. Indeed, the presence in the Act of section 1(5) [creating an onus upon the respondents to reveal the corporate connection between them] suggests a legislative recognition that an applicant trade union generally will not be aware of the business or corporate relationships between the allegedly related businesses. In view of this explicit legislative direction, we do not think that we should adopt an unduly high standard of "due diligence", or readily apply such concept to bar a union which had no *actual* knowledge of the basis on which a section 1(4) application might be made. It will be noted that section 1(4) itself does not expressly contemplate any such bar.

24. The reality of trade union organization — as illustrated by the applicant in this case — also suggests that the Board should not exercise its discretion to create an unreasonable high standard of due diligence. A union's resources are not unlimited, and this limitation must be considered in assessing how quickly a union should become aware of, investigate and respond to, situations which might call for the application of section 1(4). Jim Crockett, for example, acts as business agent for thirty-five stores (Loblaws, Miracle Food Mart, A & P, and miscellaneous independent companies) distributed over a geographic area from Ajax to Gananoque, including Peterborough and Lindsay. He services more than two thousand employees, and in addition, is A & P grievance chairman for all A & P stores in Ontario. Bud Adam another business agent services more than two thousand employees in forty-five stores spread out over southwestern Ontario and, in addition, services some small independent stores, plants, and serves as negotiator for the "Gordons Markets" chain. Each of the seven union business agents is in a similar situation and must be familiar with a number of stores, corporate organizations, and collective agreements. The Board must be careful lest it imposes upon them a standard of "due diligence" which is entirely unrealistic in the actual circumstances as they exist — especially when the respondents asserting that the union "should have known" or "acquiesced in the erosion of its bargaining rights", will usually have taken no steps to advise the union of the situation, and will usually have benefited (as in the present case) from the lower schedule of wages payable to employees not covered by a collective agreement. We have carefully considered the cases referred to by counsel for the respondents (see *Industrial Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029,

*Inducon Construction of Canada Limited*, [1975] OLRB Rep. April 399, *H. Allaire & Sons Company Limited*, [1974] OLRB Rep. July 457, *D.L. Stevens Contracting Limited*, [1978] OLRB Rep. June 531, *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. June 535, *Zaph Construction Limited*, [1977] OLRB Rep. Nov. 741, *Farquhar Construction Limited*, [1978] OLRB Rep. Oct. 914, *Harold R. Stark Limited*, [1978] OLRB Rep. Oct. 945, *Acto Builders Limited*, [1979] OLRB Rep. June 465, and *Metrus Contracting Limited*, [1979] OLRB Rep. Oct. 1009), but in our view the principle espoused in these cases amounts to no more than this: if a trade union has actual knowledge that a related company is undermining its bargaining rights or the union is wilfully blind to this fact and, without cause, fails to seek a remedy under section 1(4) within a reasonable period of time, the Board may exercise its discretion not to make a 1(4) declaration.

25. The circumstances of the present case are clearly distinguishable from those in any of the cases cited above. In the present case, the union did move to protect its bargaining rights as soon as it became aware that A & P was failing to apply the collective agreement to the employees of the Drug Mart. Similarly, the union filed a section 1(4) application within a reasonable period of time after it discovered that the pharmacy operation was being carried out through a separate corporate entity and that consequently, its earlier attempt to protect its position by filing grievances would be ineffective. On the basis of the evidence before it, the Board is satisfied that A & P, and A & P Drug Mart Limited, are “one employer” within the meaning of section 1(4) of *The Labour Relations Act*. The Board is further satisfied that there is no reason why it should not so declare. Accordingly, the Board declares that The Great Atlantic & Pacific Company of Canada Limited and A & P Drug Mart Limited are one employer for the purposes of *The Labour Relations Act*.

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**1975-80-M The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233, United Brotherhood of Carpenters and Joiners of America, Applicant, v. J.D.S. Investments Limited and Martin Ross Construction Ltd., Respondents**

**Related Employer – Whether existence of common shareholders and officers only criterion for common control and direction – Whether declaration under section 1(4) effective from date related businesses commenced or only from date of Board declaration**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

**APPEARANCES:** *J James Nyman, F. J. Leach and A. Grisolia for the applicant; Robin B. Cumine, James Ballard and David Smuschkowitz for J.D.S. Investments Limited; Martin Addario and Joseph Fishman for Martin Ross Construction Ltd.*

**DECISION OF THE BOARD;** March 20, 1981

1. The name: "416879 Ontario Limited" appearing in the style of cause as the name of one of the respondents is amended to read: "Martin Ross Construction Ltd."
2. This is a referral of a grievance to the Board pursuant to section 112a of *The Labour Relations Act*.
3. The applicant and J.D.S. Investments Limited ("J.D.S.") are bound by the terms of the Carpenters' provincial agreement. The applicant contends that pursuant to the provisions of section 1(4) of the Act, the Board should treat J.D.S. and Martin Ross Construction Ltd. ("Martin Ross Construction") as constituting one employer for the purpose of the Act and accordingly declare that Martin Ross Construction is also bound by the terms of the provincial agreement. At the hearing, the parties agreed to have the Board determine this issue before considering any other matters relevant to the referral of the grievance.
4. J.D.S. was incorporated in 1964. The firm engages in a variety of operations, including land development, building construction and property management. The firm is frequently involved with projects costing hundreds of thousands of dollars. Ninety-nine per cent of all of the shares of J.D.S. are owned by Mr. D. Smuschkowitz and Mr. Jack Israeli. Both of these gentlemen are also directly involved in the operation of the firm.
5. Martin Ross Construction was originally incorporated on July 5, 1979 as 416897 Ontario Limited. Although apparently incorporated by a firm of solicitors as a "shelf firm", at all relevant times the sole shareholder and director of the company was Mr. Martin Fishman. The head office of Martin Ross Construction is the same as the law firm which incorporated it. Martin Ross Construction has no office space of its own and no employees.
6. Mr. Fishman is an engineer by profession and is the owner of two engineering firms. Mr. Fishman also controls several other firms which are involved in real estate development

and property management. Mr. Fishman is a close personal friend of both Mr. Smuschkowitz and Mr. Israeli.

7. Approximately one year ago, Mr. Fishman asked Mr. Smuschkowitz and Mr. Israeli if they would be interested in joining with him to build a small industrial plaza at the corner of Martin Ross Avenue and Dufferin Street in Metropolitan Toronto for the purpose of leasing it out to tenants. The three men agreed to go into the project on an equal basis in their personal capacities. They also agreed that Mr. Fishman would be responsible for the construction of the plaza, although Mr. Ed Kletke, J.D.S.'s construction manager, would be available to assist him. After these decisions had been taken and the financial arrangements completed, Mr. Smuschkowitz and Mr. Israeli played no active role in the construction of the plaza.

8. Mr. Fishman decided that the construction of the plaza should be done through a separate corporate vehicle. This is what led to the activation of 416897 Ontario Limited and the re-naming of it as Martin Ross Construction. Although other of Mr. Fishman's companies do have employees, none of them were available to work for Martin Ross Construction. In addition, Mr. Fishman had made prior arrangements to be out of the country for a six week period at the same time that the project would be getting underway. Accordingly, Mr. Fishman relied heavily on Ed Kletke, J.D.S.'s construction manager. Indeed, it was agreed between Mr. Fishman and Mr. Kletke that Mr. Kletke would make the necessary arrangements for getting the project under way.

9. In September of 1980, soil tests were performed on the job site. Mr. Kletke selected the firm which did the work, and the invoice was sent to J.D.S. After first discussing the matter with both Mr. Smuschkowitz and Mr. Kletke, Mr. Fishman decided which architectural firm would be used. Mr. Kletke, however, was the one who actually made contact with the firm and Mr. Kletke requested that the plans be submitted to himself. The title sheet of the plans bears the name of J.D.S. Mr. Kletke also obtained the building permit, which was issued in the name of J.D.S.

10. Mr. Fishman asked Mr. Kletke if one of J.D.S.'s superintendents could be used on the project. Mr. Kletke then arranged to have one of J.D.S.'s superintendents, Mr. Walker, act as the project superintendent. Because of the relatively small size of the project, Mr. Walker has been on the job site only a few hours a week, but he is available whenever his services are required. Mr. Walker has been receiving his regular salary from J.D.S., although J.D.S. is being reimbursed for his services by Martin Ross Construction.

11. Before the project got underway, Mr. Fishman asked Mr. Kletke if he could make use of one of J.D.S.'s construction shacks which at the time was not being used. Mr. Kletke agreed. J.D.S.'s superintendent on the project arranged for the movement of the shack to the job site.

12. Martin Ross has no employees. Instead, all of the work to date on the project has been done by subcontractors. Mr. Kletke decided which subcontractors should do the work and he let out the contracts. At the hearing, Mr. Fishman acknowledged that he was not aware of the names of the subcontractors who had been working on the project.

13. When giving his testimony, Mr. Fishman was asked whether Martin Ross

Construction would earn a profit from its involvement with the construction of the plaza. Mr. Fishman responded that he had not given the matter any thought, and indicated that he had been looking to the leasing of the various units in the plaza for his profit.

14. Section 1(4) of the Act provides as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of the Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

15. It is clear that there are two corporate entities involved in this case, namely, J.D.S. and Martin Ross Construction. Although Martin Ross Construction is nominally the general contractor on the project, J.D.S.'s personnel are in fact performing the duties normally performed by a general contractor. In these circumstances, we are of the opinion that the two firms are engaged in associated or related activities. Accordingly, the only remaining issue under section 1(4) is whether or not the two firms are under common control or direction.

16. The respondents contend that the two firms are not under common control or direction, and in this regard rely on the fact that Martin Ross Construction and J.D.S. have no common shareholders or officers. Although the existence or non-existence of common shareholders and officers is certainly an important factor in deciding whether or not two firms are under common control or direction, the Board has indicated that it is not necessarily the determining factor and that the Board will also consider who, in fact, directs the activities which give rise to employment. See: *Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388 and *Donald A. Foley Limited*, [1980] OLRB Rep. April 436.

17. Although Mr. Fishman initially indicated that he would be assuming responsibility for the construction of the plaza and he selected Martin Ross Construction as the corporate vehicle which would build it, in fact, he relied on the skills and expertise of J.D.S. personnel, particularly Mr. Kletke, J.D.S.'s construction manager. Mr. Kletke let the contract for the soil testing and contacted the architects. Mr. Kletke also obtained the necessary building permit, and it was Mr. Kletke who selected the subcontractors and let the contracts. Actual supervision at the site was one by a J.D.S. supervisor selected by Mr. Kletke. In these circumstances, we are satisfied that the construction activities of Martin Ross Construction are in fact being carried on under the direction of J.D.S.'s construction manager. Further, the benefits of the activities of Mr. Kletke will accrue largely to Mr. Smuschkowitz and Mr. Israeli, the owners of J.D.S. These circumstances lead us to the conclusion that the related activities of the firms are being carried on under common control or direction.

18. We are satisfied that the legal preconditions for the Board to apply section 1(4) are present in this case. The Board, however, still has a discretion as to whether or not it should make a declaration under section 1(4). J.D.S. is bound by the provisions of the Carpenters' provincial agreement and when it acts as a general contractor in the construction industry, it



must abide by the terms of the agreement. In the instant case, J.D.S. provided all of the necessary human resources and skills to enable Martin Ross Construction to nominally act as the general contractor. In our view, not to make a section 1(4) declaration in this case would have the effect of undermining or eroding the applicant's bargaining rights. Accordingly, we are satisfied that Martin Ross Construction should also be bound by the terms of the Carpenters' provincial agreement.

19. Having regard to our reasoning set out above, the Board will treat J.D.S. Investments Limited and Martin Ross Construction Ltd. as constituting one employer for the purposes of *The Labour Relations Act*. The Board further declares that Martin Ross Construction Ltd. is bound by the terms of the Carpenters' provincial agreement.

20. At the hearing, the parties raised the issue as to whether a Board declaration under section 1(4) can have effect prior to the time it was made, or whether it could be effective only in the future. We are satisfied that unless a Board declaration under section 1(4) is specifically stated to be otherwise, it has force and effect from the time the associated or related activities or businesses commenced, and does not operate only from the date of the actual Board declaration. In this regard reference is made to the Ontario Divisional Court decision in *Norfolk Hospital Association v London and District Building Service Workers Union, Local 220*, 77 CLLC 14,094, as well as to the decision of this Board in *Brant Erection and Hoisting*, [1980] OLRB Rep. July 945. It is to be noted that a similar interpretation has been given to the effect of declaration under section 37 of *The British Columbia Labour Code*, which contains wording similar to section 1(4). In the *Caledonian Lands Ltd.* case, [1979] 3 Can L.R.B.R. 12, the British Columbia Labour Relations Board set out the rationale for this approach, and it is one which we would adopt:

I have referred to the statement in the *Community Builders Ltd.* decision of the purpose of a Section 37 determination in cases such as this. A further consideration of that purpose will serve to reinforce the conclusion that a determination under Section 37 that two or more entities are the same employer for the purposes of the collective agreement may well be effective for a period of time prior to the date of the Board's decision to that effect. To reiterate, where the Board makes such a finding, the purpose is, as the Ontario Board has said in relation to a parallel provision in the Labour Relations Act of Ontario,

...to preclude the erosion of bargaining units and bargaining rights through the utilization of separate legal entities as employers.

(*Retail, Wholesale and Department Store Union, Local 414 AF of L-CIO-CLC and Dominion Stores Limited and Mini-Mart Ltd.*, [1979] 1 Can LRBR 172 at p. 179)

Clearly, the effectiveness of a Section 37 determination in serving this purpose would be radically reduced if the determination were to have no effect prior to the date upon which it is made. To say that such a determination is effective only upon and after the date it is made would be to effectively establish a route by which an employer could wholly avoid collective bargaining obligations for a significant period of time.

That is because, to begin with, the Board is not able to respond overnight to Section 37 applications. The procedures of this Board, like those of any other judicial or quasijudicial tribunal, require a period of time within which to function. While this Board is making every effort to minimize that period of time in a manner consistent with the principles of natural justice, there is nevertheless an unavoidable period of time which must elapse following an application made under Section 37 or any other section of the Code before the Board can properly adjudicate and dispose of the application. That means, even assuming the application is well founded, that unless a common employer determination under Section 37 in relation to a collective agreement does have effect prior to the date upon which it is made, an employer could defeat the purposes of the determination for at least the period of time consumed by the Board's adjudicative procedures.

Even if the Board could perform the supernatural task of instant adjudication, there would still be room for an avoidance of collective bargaining obligations if a common employer determination in relation to a collective agreement were to have no effect prior to the date upon which it is made. The fact is that in the construction industry it is possible for an employer to commence a project through the vehicle of a new corporate entity in a manner which is not likely to catch the early attention of the union that is party to a collective agreement with that employer. Without being unduly pessimistic, it is inconceivable that the real world will ever be free of employers who are unwilling to recognize the force of collective bargaining rights and who will seek to defeat those rights in this manner. Trade-unions, on the other hand, are not in the business, nor should they be encouraged to enter the business, of maintaining a police force intended and equipped to detect every such attempt by unscrupulous employers.

As a result of these factors — the time involved in the Board's adjudication and the problem of detection — it is not difficult to conceive of fact patterns which involve sufficient delay to enable the completion of a construction project before the Board has determined under Section 37 that the entity in question is bound by the collective agreement of an associated or related entity. Indeed, the Board has witnessed precisely that fact pattern on more than one occasion. If the Board were to sanction the avoidance of collective bargaining obligations in this way by concluding that common employer determinations in relation to collective agreements are effective only upon and after the date the determination is made, the result would be more than a blueprint for the defeat of the thrust of the Labour Code in the construction industry. Employers would be encouraged to take advantage of the opportunity thus provided to evade collective bargaining obligations. That conduct would, in turn, generate more litigation under Section 37 and an understandable frustration on the part of the building trades unions. In all likelihood, the building trades unions would be persuaded to resort to self help measures which could harm the entire industry. All of these

considerations persuade me that it would be manifestly contrary to the objects of the Code expressed in Section 37 to conclude that common employer determinations in relation to collective agreements have no force or effect prior to the date upon which the Board makes those decisions.

These references to the very small minority of employers who would deliberately seek to avoid collective bargaining obligations provide a convenient point of departure for a consideration of the Employer's alternative argument in these proceedings. That argument, it will be recalled, is that it is only in those cases that the Board finds the employer to have acted deliberately to avoid its collective bargaining obligations that a common employer determination in relation to a collective agreement should have any force prior to the date upon which it is made. If the Board were to adopt that policy, the result would almost certainly be prolonged and perhaps more acrimonious proceedings as Board panels searched through the increased volume of evidence necessary to permit a finding as to the elusive matter of motivation. But these undesirable practical consequences for the Board are not the answer to this argument. Rather, the answer again revolves around the purpose to be served by a Section 37 determination that two or more entities are a single employer for purposes of a collective agreement. That purpose, I reiterate, is to prevent the avoidance or the erosion of collective bargaining rights acquired pursuant to the Labour Code. It must be remembered that not every new corporate entity established by an employer bound by a collective agreement is created for the sinister purpose of avoiding collective bargaining rights. There are many other considerations which may motivate the incorporation of a new company to complete a particular construction project. Tax implications are the legitimate consideration most often cited in this connection. But if the effect of the employer's utilization of a new company (or even an existing company) is to erode existing collective bargaining rights, then a Section 37 determination is an appropriate vehicle to prevent that result whether the effect was intended or not. It is for this reason that proof of a deliberate attempt to avoid collective bargaining obligations has never been a prerequisite to a Section 37 determination. In one of its first decisions under this Section, the Board stated:

The Board recognizes that corporate diversity may offer perfectly legitimate business advantages, entirely apart from labour relations issues, in such matters as taxation and financing. the concluding words of Section 37, "for purposes of this Act", confirm that the Section was not intended to interfere with those advantages. That does not mean, however, that the Board won't rely on Section 37 to correct any adverse labour relations consequences of such management decisions, even where clearly made in good faith and for valid reasons. What it means is that the operation of Section 37 does not depend, in my view, on the proof of a malicious intent on the part of the employer. . . . The point is , the Board need not and; in most



cases, will not concern itself with the issue of employer motives before reaching its conclusions under Section 37. (*Baywood Enterprises Ltd.*, *supra*, at p. 181)

I would, I believe, be counterproductive to decide that the matter of the motivation of the employer should now become a factor in this question of whether a common employer determination for purposes of a collective agreement has any force or effect prior to the date upon which it is made. Even if a new entity is established for reasons which are perfectly innocent under the Labour Code, the time consumed by the union's investigation of the new entity and the Board's adjudication of the union's application can still mean that unless the Section 37 determination does have force and effect prior to the date upon which it is made, those arrangements will have the effect of eroding collective bargaining rights even though not designed for that purpose. The employer's alternative argument must therefore fail as well.

21. In summary then, the Board will treat J.D.S. Investments Limited and Martin Ross Construction Ltd. as one employer for the purposes of the Act. The Board further declares that Martin Ross Construction Ltd. is bound by the terms of the Carpenters' provincial agreement, and that the effect of this declaration pre-dates today's date.

22. The Matter will be re-listed for hearing to hear the evidence and representations of the parties with respect to all outstanding issues.

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**1801-80-M** United Brotherhood of Carpenters and Joiners of America, Local Union 1669 and the Ontario Provincial Council of Carpenters, Applicant, v. **Kapuskasing Board of Education**, Respondent.

**Construction Industry – Section 112a – School board bound by provincial agreement – Awarding contract to general contractor – Whether work covered by provincial agreement sub-contracting clause**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** *Doug Wray and Sylvio Carriere for the applicant; Wallace M. Kenny and Al McNaughton for the respondent.*

**DECISION OF THE BOARD;** March 2, 1981

1. This is a referral of a grievance to the Board pursuant to section 112a of *The Labour Relations Act*.

2. The applicant and the respondent are bound by the provincial provisions of a subsisting Provincial agreement covering carpenters and carpenters' apprentices employed in the industrial, commercial and institutional sector of the construction industry. Article 4.01 of the agreement states as follows:

Any work that is the work of the Union under the provisions of Article 19 of this Agreement shall only be sub-contracted to an employer bound by this agreement.

3. As its name indicates, the respondent is a public school board. These proceedings involve an addition being built to one of the respondent's schools. After advertising for, and receiving tenders for the construction of the addition, the respondent awarded a contract for the entire project to Hembruff and Dambrowitz, a general contractor not bound by the Provincial agreement. Certain of the work on the school is either being, or will be, performed by direct employees of Hembruff and Dambrowitz, although much of the work has been sublet to at least five different specialty contractors.

4. The applicant contends that by awarding the contract for the school addition to Hembruff and Dambrowitz, the respondent violated article 4.01 of the Provincial agreement. The respondent, however, takes the position that it cannot be bound by the terms of the Provincial agreement since, with respect to this particular project, it was acting only in its capacity as a school board and not as an employer in the construction industry. The respondent took great care to distinguish the facts at hand from those in an earlier proceeding (*Kapuskasing Board of Education*, [1972] OLRB Rep. June 587), wherein the Board found it to be an employer in the construction industry. In that case, the respondent had acted as its own general contractor in the construction of a swimming pool and had also directly employed certain carpenters working on the project.

5. In that the respondent is not directly employing any labour on the school project, and is also not acting as its own general contractor, we are of the view that it is not at the current time an employer in the construction industry. Instead, its status is that of an owner who has let a contract for an entire project to a general contractor. It may well be that an owner can be obligated by the provisions of a collective agreement to let out contracts only to general contractors in contractual relations with a particular trade union. However, the language in article 4.01 of the agreement before us does not contain such a restriction. Article 4.01 has reference only to the subcontracting out of work. Subcontracting involves the awarding of a secondary contract, whereby a subcontractor undertakes to perform certain of the obligations previously assigned to a principal or prime contractor. In the instant case, the respondent, in its capacity as an owner, has let a primary contract to a general contractor. The general contractor has, in turn, subcontracted certain of the work to other employers.

6. In that the respondent has only let a primary contract to a general contractor, and has not itself subcontracted out any work, we are of the view that its actions do not come within the purview of article 4.01. The grievance is accordingly dismissed.

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**2481-80-R** Labourers' International Union of North America, Local 183, Applicant, v. **Mason Windows Limited**, Respondent, v. Group of Employees, Objectors.

**Bargaining Unit – Whether truck drivers, servicemen and auto mechanics having community of interest – Whether inclusion in all-employee unit appropriate – Whether Board directing vote to ascertain wishes of employees**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members F. W. Murray and O. Hodges.

**DECISION OF THE BOARD;** March 30, 1981

1. The Board's decision which issued March 11, 1981 granted interim certification to the applicant pursuant to section 6(1a) of *The Labour Relations Act*. The issue outstanding at the time was whether persons in the classifications of truck driver, serviceman and motor vehicle mechanic should be excluded from the bargaining unit sought by the applicant. The respondent and the objectors are seeking to have them excluded on the basis of insufficient community interest between the employees in those classifications and other employees falling within the bargaining unit. The objectors requested, in the alternative, that the appropriateness of the unit be determined by a vote of the employees pursuant to the Board's discretion under section 6(1) of the Act to direct a vote for that purpose. The Board reserved its decision on both issues after hearing the representations of the parties and now, having had the opportunity to consider fully those representations the Board's decision is as follows.

2. The respondent contends and the objectors concur that truck drivers (highway and cartage), motor vehicle mechanics and servicemen have separate and distinct community of interest and ought to be excluded from the bargaining unit; or, in other words, would themselves constitute an appropriate unit. There are seven truck drivers, three vehicle mechanics and three servicemen. The representations of the respondent and objectors as to the facts upon which they would be relying, if proven, to establish that employees in these three classifications share a separate and distinct community of interest from that of the other employees are as follows.

3. The respondent is a manufacturer of quality doors and windows which it distributes across Canada. The employees in the undisputed part of the bargaining unit, i.e., those for whom the applicant was granted interim certification, are engaged in the production and assembly of the door and window units. The plant in question is located in Pickering, Ontario, and the respondent's office is at the same location, although it was not indicated whether it was included in the same building as the plant. The respondent's garage for its fleet of vehicles is located on the same property some 600 feet away from the plant. The finished products are delivered by truck to the respondent's customers.

4. The respondent employs two categories of truck drivers, highway drivers and cartage drivers and the drivers are interchangeable between the two categories. When they are working as highway drivers, they are engaged primarily in inter-provincial hauling although they may also do hauls which are entirely within Ontario. Highway drivers are paid on a basis of miles driven per day and work substantially more hours than the plant employees. Cartage



drivers haul only within Ontario. Truck drivers are supervised by the Traffic Manager, a source of supervision distinct from plant supervision. It is claimed that the truck drivers have some inter-face with the office staff and with the garage employees (i.e. vehicle mechanics) who maintain and service their trucks. The servicemen are supervised by the Service Manager who is located in the respondent's office. They are dispatched from the office to deal with product complaints and their work day is spent away from the office or plant. Their vehicles are serviced and maintained at the respondent's garage by the vehicle mechanics; thus the respondent claims, they have inter-face with the office and garage employees. The three vehicle mechanics are responsible for servicing and maintaining the respondent's truck fleet, servicemen's vehicles and the mobile equipment used in the plant. The respondent maintains that the latter is the only work they do which associates them directly with the plant; the rest of their work is done at, and presumably out of, the garage. Two of the mechanics are qualified automotive mechanics, the third is a qualified welder. The respondent contends, therefore, that they utilize totally different skills than the plant employees.

5. The respondent and objectors contend that the absence of inter-face between employees in the three classifications and the plant employees (except for the vehicle mechanics when they are working on plant mobile equipment), the different nature of work, the skill differences of the vehicle mechanics, the separate sources of supervision and the different pay conditions for highway drivers establish a community of interest for employees in these three classifications separate and distinct from that of the plant employees.

6. The underlying issue in this matter is not community of interest *per se*; it is whether one bargaining unit inclusive of all of the employees engaged in the manufacture, distribution and servicing of the respondent's products is appropriate. Community of interest is only one of four main factors which the Board usually considers in determining the appropriateness of an all-inclusive unit. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526. The other three factors are centralization of managerial authority, economics and source of work and, as the Board stated in *Usarco*, while they are interdependent, they are not necessarily of the same importance. The Board, having considered the representations of the parties, is satisfied that, if proven as facts, they would not establish that the employees in the three classifications comprise a unit of such diverse interests and functions that would warrant their exclusion from a unit of "all employees" and the creation of a separate unit for them. The Board, therefore, finds it unnecessary to inquire further into the issue of community of interest.

7. Insofar as the exercise of the Board's discretion under section 6(1) to "...conduct a vote of any employees of the employer for the purposes of ascertaining of the wishes of the employees as to the appropriateness of the unit." is concerned, the Board had the following to say in its decision in *Harding Carpets Limited*, [1961] OLRB Rep. July 128:

"The Board has exercised its discretion under this sub-section to ascertain the wishes of the employees as to the appropriateness of the bargaining unit, not in cases where there is "doubt" as to the appropriateness of the bargaining unit, but in cases where in the opinion of the Board each of the several units might be appropriate, so that the wishes of the employees constitute a major factor in the determination of what unit the Board should find appropriate in the particular case."

Bearing in mind that statement and having regard for the Board's determination of the

community of interest issue, the Board is of the view that there are no circumstances in this case that would cause it to exercise its discretion to conduct a vote on the appropriateness of the unit proposed herein by the applicant and it declines to exercise that discretion.

8. In the result, the Board finds that the truck drivers, motor vehicle mechanics and servicemen should *not* be excluded from the bargaining unit. Thus the composition of the bargaining unit now may be resolved. The Board accordingly finds that all employees of the respondent in the Town of Pickering, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. A formal certificate will now issue to the applicant.

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**2432-79-R Homida Ali, Applicant, v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), Respondent, v. Ontario Hospital Association (Blue Cross), Intervener.**

**Reconsideration – Whether Board reconsidering dismissal of termination application – Scope of Board's authority to test employee wishes examined**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and B. L. Armstrong.

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG;** March 13, 1981

1. This matter involves an application for a declaration terminating the bargaining rights of the respondent, pursuant to the provisions of section 49(1) of *The Labour Relations Act*. The Board by its decision dated December 23, 1980, (See [1981] OLRB Rep. Dec. 1759) dismissed the application on the basis of the evidence before it. The Board is now in receipt of a letter dated February 2, 1981, filed by Michael Horan as counsel for the applicant petitioners, requesting the Board to reconsider that decision, on the grounds set forth in the letter. The letter reads:

Further to my letter of January 22nd, 1981, I am hereinafter setting forth the grounds for the request that the Board reconsider its decision under Section 95 of *The Labour Relations Act*. Those grounds are as follows:

1. The decision of the Board is contrary to the weight of the evidence adduced in support of the application for termination.

- (a) The Board has disregarded entirely the evidence that a great number of persons refused to sign the Petition in the Cafeteria. That evidence is certainly inconsistent with the conclusion reached by the Board as to the “probable perceptions” and what was “likely” in the minds of the persons who signed a statement of desire (paragraph 39).
  - (b) The Board has drawn a conclusion that the entire Petition was involuntary in the absence of any cogent evidence that persons who signed the Petition in the cafeteria perceived a management involvement. It is submitted that the Board’s conclusions in that respect should be based upon fact, not surmise and further that the application should be declined because the cafeteria was “inappropriate”.
  - (c) The Board has disregarded entirely the evidence of the employees relating to their apprehension with respect to job security as the motivating factor behind a desire to rid themselves of a trade union which, by its conduct, created and confirmed the reason for such apprehension.
2. The Board has seized upon a few alleged frailties in the Petition evidence in the face of the cumulative impact of all of the evidence. It is submitted that the decision is inconsistent with a fair analysis of conduct of ordinary people attempting to terminate bargaining rights for a bargaining unit of over 400 people. The realities of the situation are such that there has to be some latitude in connection with the observance of the “usual rules” that the Board has applied in cases of this magnitude. (see *Parker’s Dye and Cleaners Limited* [1974] OLRB Rep. December 859 and *Northern Telecom Limited* [1979] OLRB Rep. April 330).
  3. The fact that another trade union is “waiting in the wings” should not have any impact on the Board’s decision. The test is the true and voluntary wishes of the employees affected and it is submitted that the Board should not be more favourably disposed to termination applications brought for the purposes of circumventing any tacit “anti-raiding” pacts.
  4. The impact of the Board’s decision is once again to equate the tests applied to petitions in certification and termination cases when the facts giving rise to petitions in these kinds of cases are radically different. This decision therefore constitutes a reversal in a trend of Board decisions where the Board appeared to be becoming more understanding of the realities when the employees unwittingly have violated any of the “usual rules” in termination cases. The test, after all, relates to a determination of the true and voluntary wishes of the employees, not as to whether or not they have broken any of the “usual rules”.



5. The Board drew inference unfavourably to the petitioners on account of their failure to call certain Reply evidence. The petitioners were not represented by counsel and it is submitted that such a legalistic approach should not have been used upon the objecting employees. It is submitted that the "forgotten people" are going to become even more forgotten if the Board, as a forum is not open to them. Could any reasonable working person consider this decision fair, particularly in the light of the Board's acknowledgement that the employees may no longer want the respondent to represent them?

Under all of the circumstances, the objecting employees would ask the Board to reconsider its decision for the reasons aforesaid and, if the Board is not disposed to reconsidering its decision in its totality, the objecting employees would ask the Board to consider discounting those signatures on the Petition gathered in circumstances that the Board, according to its enunciated criteria, have found not to be "voluntary".

2. The Board has now reviewed the applicant's request for reconsideration, together with the comments of the parties thereon. The Board finds nothing contained in the grounds for reconsideration which was not before the Board and considered by it prior to rendering its decision of December 23, 1980, and accordingly finds no basis on which to vary or revoke that original decision. While the Board sees no merit or necessity in repeating at length the reasons for its conclusions contained in the original decision, the Board, in the circumstances of this case, is prepared to comment briefly on some of the submissions and misapprehensions contained in the request for reconsideration.

3. It must be recognized that nowhere in *The Labour Relations Act* of this province is the Labour Board granted a *general* power in representation matters to resort to a Board-supervised vote as an aid in resolving a question of employee wishes (compare, for example, the *British Columbia Labour Code*, R.S.B.C. 1979, c.212, s.43(1), s.52(2)). The powers of our own Board are granted in specific terms, and in, for example, an application for a declaration terminating bargaining rights, the requirements of section 49(3) must be met. Section 49(3), once again, provides:

Upon an application under subsection 1 or 2, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made *and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause j of subsection 2 of section 92 that they no longer wish to be represented by the trade union*, and, if not less than 45 per cent have so signified, the Board shall, by representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

(emphasis added)

It is not sufficient that the background or history of the application raises, in general terms, a "question of representation", as that term is used, for example, in the United States' *National Labour Relations Act* (1935), P.L. 198, 74th Congress, as amended, section 9(c)(1) (although

a *prima facie* showing of 30 per cent support for an application is still required even under the Act). The Board did not, as the submissions of the applicant and the intervener employer infer, fail to take into account in arriving at its original decision, either the history of this matter, including the profile of the strike, or the conduct of the respondent trade union itself, in particular in choosing, as a part of the economic sanctions available to it, to openly endeavour to divert business away from the employer. All of this assists the Board in assessing the sincerity of the petitioners who testified before it, as well as inferring the probable motivation of the remaining employees who do not appear before it, when such employees have been asked to sign the supporting petition in circumstances which are at least ambiguous.

4. The circumstances in the present case, however, were *not* ambiguous. The clear majority of signatures were obtained in the cafeteria, where both managerial and non-managerial persons eat their lunch, often at the same table. From the evidence it is clear that each of the petitioners, like Mrs. Ali, were highly visible and would attract attention when circulating from table to table in the cafeteria to solicit signatures. The act of signing is itself an overt act, requiring more than mere dialogue, and an individual employee's decision to sign or not to sign is readily discernible by anyone seated close enough to observe the employee's actions. Unlike the vast majority of cases which come before it, the Board in this case was not called upon to engage in a process of inductive reasoning as to whether employees would or would not themselves have inferred that their decision to sign or not to sign an anti-union petition would probably be communicated to members of management: employees in this case were being asked to sign the petition in circumstances in which members of management could *see* whether they were signing.

5. The Board in its initial decision made it clear that it found, in the context of all of the evidence and full history of this matter, nothing that was culpable in the conduct of the employer itself. But it would be naive, at the same time, to regard the intervener as simply a benign public employer, essentially neutral in its views toward the trade union with whom it was dealing. Without losing sight of the role of the respondent in this affair, the intervener, like employers in the private sector, had exercised its right to endure a prolonged strike (and other sanctions) rather than enter into a first agreement which contained the kind of Union Security clause ultimately legislated by Bill 89. The only relevance of this to the present application is to leave little doubt that the employees themselves would perceive the intervener as a great deal less than neutral in its feelings about the respondent union. The atmosphere, after months of continuing economic conflict, was charged in the extreme. In spite of the size of the unit, the petitioners had a responsibility to their fellow employees not to place them in the position of being asked to sign the petition in the presence of supervisors. Notwithstanding the protestations of the petitioners and of Mrs. Ali in particular, the evidence relating to the cafeteria, and the evidence of the supervisor, Mrs. Holmes, makes it clear that the petitioners paid limited heed to that responsibility. The evidence of Mrs. Holmes was directly contradictory in this regard to the position maintained by Mrs. Ali before the Board, and there was no suggestion that the petitioner representatives, who were an extremely intelligent and capable group, misunderstood the opportunity to call reply evidence. It is no answer to the Board's concerns to observe that a certain number of employees actually refused to sign the petition in the cafeteria. There may always be a number of employees so strongly supportive of the union that they will refuse to sign a petition no matter what the circumstances in which it is presented. The question the Board must ask itself is how many of the employees who *did* sign the petition would have done so without the distorting circumstance of supervisors being present at the time. The Board has no way of knowing the answer to this. Whatever may have

been the wishes of the other employees at the time, the circumstances in which they were asked to sign the petition made it impossible for the Board to make a finding that the act of signing represented a *voluntary* expression on the part of 45 per cent of the employees in the unit, as the Act requires the Board to do.

6. Mr. Horan's alternative submission requests the Board to simply discount those signatures which the Board has not been satisfied were "voluntary". Given the number of signatures collected in the cafeteria, this approach, for the reasons given in the paragraph above, is of no assistance to the petitioners. In addition, the Board would then be required to assess the impact of the other factors set out in paragraphs 37, 38 and 39 of the original decision on employees' perception of management involvement in the petition as a whole. Given Mrs. Ali's ultimate indiscretion of spending an entire day in the cafeteria gathering signatures on the petition, this would not be a fruitful inquiry for the petitioners. As the Board stated in paragraph 39 of its decision:

Any doubts which employees may have had, based on her other petitioning activities, as to Mrs. Ali's connection to management would likely have been dispelled by that indiscretion, and this occurred early in the period of circulation.

7. The Board, in conclusion, approached the evidence with all of the latitude that a termination (as opposed to certification) application and the circumstances of this particular case demanded. To find that the petition relied upon represented a "voluntary" expression by 45 per cent of the employees, in the circumstances in which they signed, would have required more than "some latitude" on the part of the Board; it would have required the Board essentially to ignore the facts established by the many days of evidence. Apart from the Board's statutory mandate, there are other persons equally interested in this application besides the petitioners, and the Board has neither cause nor justification to go this far.

8. The request for reconsideration is dismissed.

#### **DECISION OF BOARD MEMBER J. D. BELL;**

My own view of this matter remains as set out in my dissent of December 23, 1980.

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**0993-79-R** United Food and Commercial Workers International Union, AFL-CIO-CLC, Applicant, v. **Research Foods (1976) Limited**, Respondent, v. Group of Employees, Objectors.

**Charges – Employee – Petition – Section 7a – Whether persons exercising managerial functions – Suspensions and withdrawal of overtime motivated by anti-union animus – Employer asking employees to sign petition and not to appear at Board hearing – Whether petition voluntary – Whether Board certifying without a vote**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members F. W. Murray and M. J. Fenwick.

**APPEARANCES:** *Martin Levinson, A. Millard and Vincent Gentile for the applicant; Philip Joseph Wolfenden and Harvey Tenenbaum for the respondent; Brian Sherman for the objectors.*

**DECISION OF THE BOARD;** March 20, 1981

1. This is an application for certification.
2. By a decision in this matter dated November 8, 1979, the Board found that the applicant was a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. The respondent company produces powdered foodstuffs or spices that are purchased by other companies to manufacture their food products. To produce this product the respondent runs a 24-hour, four day a week operation. The first step in the process is the grating of cheese. The cheese is then put in a melter or cooker at which point spices are added. The material then proceeds to a dryer after which it is sucked into bags. Each function is performed in an area that openly abuts onto the next step in the chain.
4. The applicant contends that four persons employed by the respondent exercise managerial functions within the meaning of section 1(3)(b) of the Act and are not, therefore, employees for the purposes of the Act. These people are Michael Gazzaruso, the shipper/receiver and Jack Achjian, Manuel DaSilva and Fillippo D'Onofrio who are plant labourers. The parties agree that Rex Manradge and Dennis Cummings are employees within the bargaining unit. Additionally, the applicant withdrew its challenge to the laboratory technician and agreed with the respondent that he falls in the bargaining unit.
5. In *Cottage Hospital (Uxbridge)*, [1980] OLRB Rep. March 304, the Board at pp. 305-306 set out the principles it follows in determining whether a person exercises managerial functions within the meaning of section 1(3)(b) of the Act:

Over the years the Board has developed general guidelines to assist it in evaluating whether an individual exercises managerial functions (see *Inglis Limited*, [1976] OLRB Rep. June 270, *Chrysler Canada Limited*, [1976] OLRB Rep. Aug 396 and *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. Apr. 261). For those persons whose work has little or no impact on the employment relationship, the Board looks to whether

or not they exercise independent decision-making responsibilities in matters of policy or the running of the organization. The Act does not operate to exclude those who only make effective recommendations in this regard. Nor does it exclude persons whose independent decisions are either circumscribed within pre-determined limits set by others or limited to technical and procedural determinations flowing from their expertise in a limited field. (See *Libby, McNeil and Libby of Canada*, [1967] OLRB Rep. May 193; *Inglis Limited*, *supra*; and *Dominion Stores Limited*, [1976] OLRB Rep. Aug. 44 and *Canadian General Electric*, [1979] OLRB Rep. Jan. 12.

Different considerations apply to the work of a second group of persons who may be characterized as having a direct effect on the employment relationship or the terms and condition of employment of those in the employ of the organization. Supervisors of employees or those technical experts whose work affects terms and conditions of employment or hiring and employment policies would fall within this group. In determining whether such persons whose work has a direct effect on the employment relationship exercise managerial functions, whose work has a direct effect on the employment relationship exercise managerial functions, the Board assesses whether or not they exercise effective control and authority over employees either in direct contact with the employees or through their decisions. In making this evaluation the Board looks to whether the person has, at a minimum, the authority to make effective recommendations relating to conditions of employment. An effective recommendation is a 'serious recommendation that the evidence demonstrates is usually acted upon, and therefore a recommendation that materially affects the economic lives of employees'. (*McIntyre Porcupine Mines Limited*, *supra*, at 289).

6. The four challenged persons in this case are alleged by the applicant to exercise supervisory responsibilities. Accordingly, in assessing whether they exercise managerial functions the Board will look to whether, at a minimum, they have the power to make effective recommendations in matters affecting the employment relationship of the people they supervise. Particularly pertinent are their duties and responsibilities in such areas as hiring, discharge, discipline, promotion, wages, the assignment of overtime and the granting of time off.

7. Regarding Mike Gazzaruso, the shipper-receiver at the plant, counsel for the applicant acknowledged that on the evidence contained in the Report of the Board's Officer he could not argue that Gazzaruso exercises managerial functions. He asked the Board to consider, however, that a notice posted by management prior to the application for certification entitled "New Plant Organization" reveals that management considered him to be managerial because it classified him as the "shipping/warehouse foreman". Whether the respondent considered Gazzaruso to be part of management, however, is not by itself relevant to the Board's determination of whether, for the purposes of the Act, he is an employee. In reviewing the evidence of Gazzaruso's duties and responsibilities we find no evidence to support the conclusion that he exercises managerial functions within the meaning of section 1(3)(b) of the Act. We find, therefore, that he is an employee.

8. The Board has reached a similar conclusion with respect to the status of the other three challenged persons. Though two of these persons, like Gazzaruso, are identified on management's organization chart as "foremen", the Board has repeatedly stated that classification labels, by themselves, cannot determine the issue. (Moreover, see the Board's decision in *Hydro Electric Commission of the Borough of Etobicoke*, [1981] OLRB Rep. Jan. 38, where a group of foremen were found by the Board to be employees for the purposes of the Act.)

9. Some evidence was presented suggesting that Mr. Fillippo D'Onofrio may have fired an employee. This alleged incident, however, took place two weeks after the application for certification. To enhance the reliability of evidence, the Board, in assessing the duties and responsibilities of people in dispute, generally looks only to evidence of events which have taken place up to the date of the application for certification. We find no justification for departing from that practice in the circumstances of this case.

10. Standing alone, such factors as the training of other employees, the possession of keys, the absence of punching a time card and the mere assigning of work are not sufficient to establish that a person exercises managerial functions. To be viewed as managerial by the Board, persons must exercise effective control and authority over the people they supervise as would be seen in this case by the power, at a minimum, to make effective recommendations. There is no evidence relating to the duties and responsibilities of Fillippo D'Onofrio, Jack Ashjian or Manuel DaSilva which persuades the Board that they possess the power of effective recommendation in matters affecting the employment relationship of other employees.

11. Counsel for the union emphasized that the respondent runs a twenty-four hour operation. He argued that there would inevitably be someone who exercises managerial functions to supervise the night shift. The deduction does not follow automatically and the question can only be determined by an evaluation of the actual duties and responsibilities of the persons in question. In this case the Board is satisfied on the evidence that the respondent company has chosen not to have a member of management continually on the premises throughout the night. Instead they have designated one of their members, Mr. Karl Meyers, to be on call if a problem arises. When necessary he goes to the plant where he has a bed available to him.

12. Having regard to all the evidence relating to the duties and responsibilities of the persons in dispute the Board concludes that M. Gazzaruso, F. D'Onofrio, M. DaSilva and J. Ashjian are employees for the purposes of the Act and fall within the bargaining unit.

13. The Board further finds that all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 5th, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.



15. Pursuant to section 7a of the Act the union has asked the Board to exercise its discretion and certify it as the exclusive bargaining agent of the employees in the bargaining unit without a representation vote. Section 7a of the Act provides as follows:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

To issue a certificate under section 7a without a representation vote the Board must determine whether the employer has violated the Act, whether the employees would be able to freely express their wishes and whether there is sufficient support for collective bargaining.

16. Looking first to the union's support, the Board concludes that the union has membership support adequate for collective bargaining. It is only one card short of having membership support in the bargaining unit of more than 55 per cent of the employees. While a petition in opposition to the application was filed with the Board containing some names which coincide with the names of persons who signed union membership cards, the Board, as explained below, is not persuaded by the evidence that the petition represents the voluntary wishes of the signatories. Accordingly, in evaluating membership support the petition does not cause the Board to doubt the reliability of the membership strength as reflected by the membership cards themselves.

17. We turn to the question of whether the employer has violated the Act. Among other allegations the union contends that the employer violated the Act by suspending Rudolph Gonsalves on March 14, 1980, by denying overtime work to Gonsalves, Rex Manradge and Jim Merrimen between March and October 1980 and by acting in a threatening manner towards both Manradge and Merrimen.

18. On March 14, 1980 Mr. Jerold Shaffer read the following letter to Mr. Gonsalves.

Dear Sir;

On three separate occasions in the past several months since your return to work on Dec. 3rd. 1979, I have had occasion to discuss with you the serious nature of complaints received from employees that you had threatened, coerced, and used pressure tactics to enforce certain opinions on them. This past week I have had two serious other complaints in this regard including one where an employee has said he may have to resign if this continues. Obviously such a situation cannot be tolerated and it is with regret that I am suspending you for a period to be discussed on Monday, when we will advise you of the length of your suspension which begin Monday at 7:00 A.M.

Any further action of this type on your part will result in further discipline up to and including dismissal,

Yours truly,

"H. Tenenbaum"  
General Manager

On the following Monday, Tenenbaum imposed a three day suspension ending on Wednesday, March 19th.

19. Consistent with his letter of suspension Mr. Harvey Tenenbaum, the president and general manager of Research Foods, initially testified before the Board that he had spoken to Mr. Gonsalves on previous occasions about employees who were complaining that Gonsalves was being over-zealous in advocating his position on union matters. Gonsalves, however, denied that Tenenbaum ever discussed with him the threats alluded to in his letter of suspension. On cross-examination Tenenbaum clarified his evidence. Tenenbaum acknowledged that Gonsalves asked him at the time of the suspension who in particular had complained and what had been said. He admitted, however, that he never did tell him. He further conceded that, apart from the specific incident giving rise to the suspension, he never provided Gonsalves with the details of any of the alleged incidents. Despite the assertions in his letter of suspension, Tenenbaum identified for the Board only one person who had complained about Gonsalves' conduct and was vague about what had actually been said on that occasion.

20. On the basis of all the evidence the Board concludes that, contrary to the statements in his letter of suspension and apart from the incident on March 14th which is discussed in further detail below, Tenenbaum neither received complaints that Gonsalves had threatened employees with his views nor discussed such complaints with him.

21. The incident which precipitated Gonsalves' suspension involved another employee, Mr. Gus Kokkoros. Tenenbaum testified that on March 14, 1980 Kokkoros told him that Gonsalves had asked him to tell him to which areas of the plant he had keys. According to Tenenbaum, Kokkoros related that Gonsalves had told him not to tell anyone from management that he had asked him about keys. When counsel for the union asked Tenenbaum to explain the coercion in this incident that he had referred to in his suspension letter, Tenenbaum replied that he viewed the statement that Kokkoros shouldn't tell management about the conversation as an implied threat. Additionally, he concluded from his conversation with Kokkoros that Kokkoros had felt threatened. Tenenbaum further said he was disturbed because it appeared that, contrary to the Board Officer's direction, Gonsalves was discussing issues, presumably keys, raised in the Examination hearings into the duties and responsibilities of the persons in dispute.

22. In further relating the events of March 14th Tenenbaum testified that he asked Gonsalves to come to his office after Kokkoros told him about the incident. According to Tenenbaum, when he related the incident to him on the way to the office, Gonsalves became irate, refused to come to the office and accused Tenenbaum of continually terrorizing him. After Gonsalves had returned to his work place Tenenbaum re-approached Gonsalves and directed him to come to his office at 10:00 a.m. By Tenenbaum's evidence, it was when

Gonsalves went home without coming to his office that he decided to suspend him. He testified that he concluded from Gonsalves' departure that Kokkoros had been telling the truth.

23. Gonsalves gave a different account of the events of that day. According to Gonsalves, Tenenbaum came to the cheese room where Gonsalves was working and, put politely, told him not to "mess around" with the union. He further directed him to come to his office. On the way to the office, according to Gonsalves, Tenenbaum rhetorically asked if he was looking for trouble and told him that if he was he would get hurt. In the office area Tenenbaum told Gonsalves that he had heard that he had talked to one employee about something that had gone on at the Examination hearings which was against the law. When he denied having asked another employee about matters raised at the Examination hearings, Tenenbaum, according to Gonsalves, addressed him with foul language, called him a liar and poked him in the chest with his finger backing him up against the wall. By Gonsalves' account, when he left the office Tenenbaum shouted after him not to "mess around" with the union, threatening that if he didn't listen he'd get hurt.

24. Consistent with Tenenbaum's evidence, Gonsalves testified that soon thereafter Tenenbaum returned to his work area and directed him to come to his office before going home. Contrary to Tenenbaum's evidence, however, Gonsalves testified that he immediately refused to go saying that if Tenenbaum had something to say about the union he should do so right there. It is common ground that Gonsalves did not go back to Tenenbaum's office. Gonsalves said that when he finished his work he went home directly because he was afraid to go back to Tenenbaum's office. At home Gonsalves responded to a message to call the office and Shaffer read him the letter of suspension.

25. Concerning the specific incident with Kokkoros, Gonsalves testified that he had gone to the locker room to ask Kokkoros to get him a new pair of work pants. Kokkoros, however, told him that he had no keys. Gonsalves denied that apart from mentioning the word "keys" he discussed evidence given at the Examination hearings. He further denied that he told Kokkoros not to tell the company about their conversation.

26. Numerous factors cast doubt on the reliability of Tenenbaum's explanation for Gonsalves's suspension. According to Tenenbaum the event that precipitated the suspension was the Kokkoros incident. Kokkoros, however, was not called by the employer to testify even though Gonsalves contradicted Tenenbaum's account of the conversation between Gonsalves and Kokkoros. Additionally, while Tenenbaum told the Board that it was when Gonsalves went home instead of coming to his office that he decided to suspend him, his non-appearance at the office was not mentioned in his letter of suspension. When the absence of this reference was put to him at the hearing on cross-examination, Tenenbaum said that his main concern was the duress to which Gonsalves had subjected Kokkoros. Tenenbaum's evidence did not detail, however, what Kokkoros said to cause him to draw this conclusion. Contrary to the apparent reference to the event in his suspension letter, Tenenbaum did not testify before the Board that Kokkoros actually told him that he felt threatened or that Kokkoros said he was going to resign. Nor did Tenenbaum relate to the Board an incident concerning anyone else who had threatened to resign because of threats from Gonsalves. This reference to resigning in the letter of suspension is left entirely unsupported by the evidence. Further, Kokkoros himself did not testify to support Tenenbaum's assertion that he had suffered duress at the hands of Gonsalves.



27. In view of the weaknesses set out above, the Board concludes that Tenenbaum did not accurately portray the situation in his letter of suspension. In the circumstances the Board cannot accept Tenenbaum's explanation for Gonsalves' suspension. On the other hand, the Board found Gonsalves to be straightforward in his testimony and was given no cause to doubt the veracity of his evidence. The detail with which he related events further persuades the Board to accept his account of what transpired on March 14, 1980. Regarding knowledge of union activity, Tenenbaum agreed that he knew Gonsalves had been the union's adviser at the Examination hearings that were being conducted during this precise period of time. He further confirmed that Gonsalves was known to him as having particularly strong feelings about the union and working on behalf of the union.

28. On the basis of all the evidence, the Board concludes on the evidence that in suspending Gonsalves on March 14, 1980 for three days effective March 17th Tenenbaum was motivated by anti-union *animus* contrary to section 58 of *The Labour Relations Act*.

29. The next alleged violation of the Act concerns the withdrawal of Friday overtime from three union supporters. On the date Gonsalves was suspended he was working Friday overtime in the cheese room. The normal work week at Research Foods is Monday through Thursday. The work performed on Friday is generally viewed as voluntary overtime. When there is an abundant supply of cheese, some cheese production is done on Friday. If not, then Friday work in the cheese room would be limited to cleaning the buckets and hosing down the room in preparation for next week.

30. Prior to Gonsalves' suspension Friday overtime work was available with regularity to the people from the cheese room. On March 20, 1980, however, the day Gonsalves returned from his suspension he, Rex Manradge and Jim Merrimen, all union supporters, were told by Shaffer that they would no longer be working overtime on Friday because there was no more work for them to do. For those in the other sections of the production chain, the availability of overtime work continued as before. This cut back in work had a particularly adverse impact on Merrimen who testified at these proceedings on behalf of the union. To accommodate his personal life, he had previously made arrangements with the company to work only 10 hours a day, Monday through Thursday, instead of the normal 12. He made up the lost time by regularly working five hours on Fridays. When he was cut off from Friday work he lost what he had come to view as part of his regular work week.

31. Mr. Tenenbaum and Mr. Shaffer each stated that their decision to no longer call in the people from the cheese room to do Friday overtime work was motivated by a reduction in the available work. They did not, however, support this explanation with records that would demonstrate a decline in cheese production. Whether or not there was enough cheese to engage in production each Friday, it is undisputed that the cheese room had to be cleaned. Both Mr. Tenenbaum and Mr. Shaffer testified that after March 20th they asked people from the dehydration section who were working on Friday anyway to clean the cheese room. They testified that in their view it did not make economic sense to call in people from the cheese room simply for the one or two hours it would take to clean it.

32. About a week prior to the resumption of the Board's own hearings in the fall of 1980 following the Officer's Examination hearings which were held through the winter and spring of 1980, it is agreed that Tenenbaum told Gonsalves and Merrimen that they could, at any

time, come in for Friday overtime even if there was not cheese production, and thus for clean-up only.

33. The three witnesses who testified on behalf of the union all work in the cheese room. The Board is satisfied on the evidence that the decision not to give them Friday overtime work from March 20th onwards was a departure from past practice. While the company attributed this alteration in scheduling to a shortage of cheese, no records were produced to support this assertion, and, when pressed, Tenenbaum indicated that the Monday to Thursday cheese production remained relatively constant. The evidence does not support the conclusion that anything happened as of March 20th to precipitate a change in policy. If at that time the company simply made a business decision not to use cheese room people for clean up alone because it was not economically sound, the Board has difficulty understanding why shortly before the resumption of the Board's hearings Tenenbaum would have told Gonsalves and Merrimen that they could come in on Friday whenever they wanted even if it was for clean-up only. The apparent absence of a business underpinning for this further change in scheduling policy is heightened by the fact that Shaffer, the person in charge of scheduling, was unaware of Tenenbaum's offer in October of 1980 to allow Gonsalves and Merrimen to come in on Fridays for clean-up only. At the hearing Shaffer reiterated his view that there was no economic justification for calling in a person on Friday just to clean the cheese room.

34. The timing of the withdrawal of overtime cannot be ignored. The Examination hearings into the duties and responsibilities of the challenged persons were still continuing in March, 1980. Gonsalves was the union's adviser and both he and Merrimen testified for the union. The Board has already concluded that in suspending Gonsalves on March 14th Tenenbaum was motivated by anti-union *animus* contrary to the Act. On the date of his return he and the two other union supporters were told that they would no longer be given overtime work on Fridays. For the reasons canvassed above the Board is not persuaded that the decision to withdraw overtime was in fact motivated by business concerns even if in the abstract the decision was economically sound. In all of the circumstances, the Board concludes that the respondent was motivated by anti-union *animus* when it refused, with two exceptions, to offer Friday overtime work to Gonsalves, Merrimen and Manradge from March to October, 1980.

35. Merrimen and Gonsalves both testified that on two occasions Mike Gazzaruso, the circulator of the petition and the person who appeared on behalf of the petitioners throughout the proceedings, admitted to them that the company was paying his legal fees. The first occasion was just prior to Gonsalves' suspension and the second was during the summer of 1980. The Board has carefully reviewed all the evidence relating to these two alleged admissions and concludes that Gazzaruso made the statement on each occasion. Whether the company is in fact paying the petitioner's legal fees is another question. We note though that neither Mr. Tenenbaum nor anyone else from management testified that they were not in fact paying Mr. Gazzaruso's legal bill for these extended proceedings.

36. Mr. Rex Manradge gave evidence relating to an incident which occurred during the actual circulation of the petition at the end of August 1979. He testified that in an effort to persuade him to sign the petition Mike Gazzaruso approached him three times on August 31, 1979, the final day of circulation. Mandrage stated that when he complained to Tenenbaum that Gazzaruso was bothering him, Tenenbaum asked him to sign "the paper" for the company. According to Mandrage, Tenenbaum told him that if the union got in their benefits



would be cut and they would have to work nights. Mandrage testified that he went on to say that if there was a layoff the people who signed for the union would be the first to be affected. Manradge stated that he told Tenenbaum he wanted to remain neutral. According to Manradge, Tenenbaum told him that while he was a good guy he could be real mean if he wanted to. Manradge stated that the conversation ended with Tenenbaum telling him that "the paper" was with Gazzaruso and asking him to get more people in the cheese room to sign.

37. Manradge testified to another incident. September 11, 1979 was the date originally scheduled by the Board to hear the certification application. By the agreement of the parties, however, it was adjourned to October 2, 1979. According to Manradge, Tenenbaum approached him on September 11th asking him why he had to go and see "the union guys" again. When Manradge denied seeing anybody, Tenenbaum, according to Manradge, insulted him and bounced him against the wall waving a paper in his hands which Manradge stated he did not see. Manradge testified that he went on to say "Don't you know you have to go to court. . . You'd better not show up in court." The Board notes that Rex Manradge was in receipt of a "Summons to Witness" issued by the Board dated September 6, 1979.

38. Counsel for the employer sought to impeach the credibility of Manradge by raising an event that occurred a year later in September of 1980. The employer produced one of Manradge's time cards and asked if on the day in question Manradge had punched the clock two times at night rather than once when he arrived in the morning and once upon leaving at night. As the respondent operates on twelve-hour shifts, double punching is feasible. Manradge denied, however, that he had done so. Having regard to the a.m. and p.m. code embodied in the respondent's time clock, the Board is persuaded that Manradge was less than candid when he denied double-punching the time clock on that occasion. The Board is further satisfied on the evidence, however, that he was at work both in the morning and afternoon that day and was not trying to deceive the company into paying him a full day's wages for a day upon which he did not actually work. The Board is most concerned, however, with Manradge's lack of candor in at least one element of his testimony.

39. Counsel for the employer asked the Board to reject all of Manradge's testimony on the basis of the time card incident and to accept instead the evidence of Tenenbaum where it conflicts with Manradge's.

40. As indicated in the Board's evaluation of the suspension incident, however, the Board has found that Tenenbaum, like Manradge, has been less than candid in some of his evidence. The Board was particularly impressed with the quality of evidence given by Merrimen and Gonsalves. It was straightforward, reasoned, detailed and unexaggerated. Where their evidence is in conflict with Tenenbaum's the Board, prefers their testimony. These conflicts raise further doubts about the reliability of some aspects of Tenenbaum's evidence. In these circumstances the Board declines to use the double-punching incident to reject outright all of Manradge's evidence in favour of Tenenbaum's version of the events of September 4 and September 11, 1979. A further evaluation of their respective evidence is therefore required.

41. Tenenbaum admitted that as of September 4, 1979 he had in his possession a photocopy of the petition in opposition to the union's application for certification which had been circulated by Mike Gazzaruso. Gazzaruso admitted that he left a copy on Harvey Robinson's desk. Mr. Robinson is the assistant general manager of Research Foods. It is undisputed that Robinson showed the petition to Tenenbaum. When Gazzaruso was asked



why he had given a copy of the petition to the assistant general manager he said, "I just thought he should know about what was going on".

42. It is further undisputed that on September 4, 1979 Tenenbaum showed the petition to Merrimen. The Board accepts Merrimen's evidence of the surrounding circumstances. Merrimen testified that he was approached by both Tenenbaum and Robinson and was told that he would be given a raise whether he supported the union or not. When Tenenbaum then asked him whether he would support the company against the union, Merrimen said he'd go along with the majority. Tenenbaum replied that the company was in the majority and took Merrimen to his office to show him a copy of the petition. The Board accepts Merrimen's further evidence that Tenenbaum told him that if the union got in it would disturb their shifts and they would have to work with a reduced staff because the competition was too tough. We note that when asked about this occasion by counsel Robinson and Tenenbaum gave somewhat conflicting accounts. Tenenbaum, for example, said that he told Merrimen he didn't know what the majority of employees wanted but knew from the petition that a lot were against the union. Robinson, on the other hand, said that Tenenbaum told Merrimen that the "list" in his office showed that the majority were opposed to the union. Whatever Tenenbaum in fact said on this point, it is clear on the company's own evidence that they were extremely interested in the petition and that they showed it to an employee to demonstrate the extent of support against the union.

43. Turning back to the events of August 31st and September 11th we note that the threats Manradge alleged Tenenbaum made to him are similar to those we have accepted in Merrimen's evidence.

44. The Board has found that Tenenbaum was motivated by anti-union *animus* in March, 1980 both when he suspended Gonsalves and when he withdrew voluntary Friday overtime from Gonsalves, Merrimen and Manradge. It is apparent from the company's own evidence that Tenenbaum showed particular interest in the petition when on September 4th he showed it to Merrimen to persuade him that a majority of the employees were against the union. Furthermore, he told Merrimen that the union would disrupt the shifts and cause the staff to be reduced. Given these circumstances, the Board concludes, on the balance of probabilities, that Manradge's account of the events of August 31, 1979 and September 11, 1979 are to be preferred where contradicted by Tenenbaum. The Board concludes therefore that on August 31, 1979 in violation of sections 56, 58 and 61 of *The Labour Relations Act*, Tenenbaum asked Manradge to sign the petition against the union and threatened that if the union got in their benefits would be cut, they would have to work nights, and those who signed for the union would be the first to be laid off. The Board further accepts that on September 11, 1979 contrary to section 71 of the Act, Tenenbaum warned Manradge not to appear at the Board's hearing.

45. Given Tenenbaum's involvement in the petition and the threats he made while the petition was still being circulated, the Board is not persuaded that the petition represents the voluntary wishes of those who signed.

46. We turn to consider whether the taking of a representation vote would reflect the true wishes of the employees. A substantial amount of time has passed since the union's application for certification was filed, since Tenenbaum participated in the circulation of the petition and since he originally threatened adverse consequences if the union was successful.

The evidence reveals, however, that the employer did not take steps to diminish the adverse effects of its initial anti-union conduct. On the contrary, the employer engaged in further violations of the Act six months later while the Examination hearings were in progress. He wrongfully suspended Gonsalves and cut three union supporters off of Friday overtime. Though it would appear on the evidence that as of October, 1980 the overtime was again available to these employees, the Board is not satisfied that the adverse impact on employees of the employer's violations of the Act has been dissolved.

47. Further pertinent to the ability of employees to freely express their wishes is a notice posted by the employer on September 23, 1980:

*NOTICE*      SEPT. 23/80

As a result of complaints made to the Dept. of Labour by several employees we have been advised by an inspector that the holiday pay for employees must be on the basis of the Employment Standards Act. *Employees according to the act* must be paid for 7 statutory holidays a year, provided all other requirements of the act are complied with.

New Year's Day  
Good Friday  
Victoria Day  
Dominion Day

Labour Day  
Thanksgiving Day  
Christmas Day

As it is our desire to avoid conflict with the Dept. of Lab. and disputes over such matters, we will comply strictly with the law as outlined and pay according to the act for the statutory holidays that the act describes.

48. Prior to this notice the union had successfully submitted a complaint to the Employment Standards Branch of the Ministry of Labour alleging that the employer was not properly paying its employees holiday pay. As a result of the claim the employer was required to pay between \$1,200.00 and \$1,400.00.

49. The year prior to the union's complaint, the employees were given nine holidays. Tenenbaum testified that on the average the respondent gave employees eleven holidays a year. According to Gonsalves, they have received nine holidays annually since 1977. Whatever the actual number, it is evident that the employees annually received at least two more holidays than required by *The Employment Standards Act*.

50. The notice of September 23, 1980 states that the employer will comply strictly with the law. The union alleges that by this notice the employer was cutting the number of holidays and virtually punishing the employees for the union's success with their complaint before the Employment Standards Branch. The employer, on the other hand, contends that the notice was posted merely to indicate its intention to abide by the law. It denies that it intended to cut employees' holidays.

51. On the balance of probabilities and in the context of the other violations of the Act engaged in by the employer, the Board concludes that this notice constitutes another violation

of the Act. For years the respondent has provided its employees, on an annual basis, with at least two holidays in excess of those required by statute. By the employer's own evidence it has given, on average, four more than required. The Board is satisfied that in posting this notice stating that from hereon it would comply strictly with the law the employer intended to tell employees that it would be reducing the number of their annual holidays. The Board concludes that it did this to further demonstrate to the employees the adverse consequences that would flow from an association with the union.

52. The posting of this notice was a highly visible act which would quickly come to the attention of employees who, quite naturally, are concerned about their holidays. The employer's threatened reduction of holidays would, in the Board's view, have an adverse impact on the ability of the typical employee to freely express his wishes. Furthermore, the employer's denial of overtime to three union supporters and its suspension of the union's advisor at the Examination hearings were also visible acts in a small, open plant which the Board concludes would compromise the ability of an employee to decide whether or not to support the union.

53. Having regard to all the circumstances the Board concludes, on the balance of probabilities, that the employees' true wishes would not be ascertained in a representation vote.

54. The three criteria in section 7a of the Act have been established. Accordingly, the Board, pursuant to its discretion in section 7a, certifies the union without a representation vote.

55. A certificate will issue to the applicant.

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**0914-80-U** Teamsters Local Union No. 647, Milk & Bread Drivers, Dairy Employees, Caterers and Allied Employees, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complaints, v. **Silverwood Dairies**, Division of Silverwood Industries Limited, Respondent.

**Charges – Practice and Procedure – Section 79 – Order of proceeding where reverse onus applies only to some of the allegations – Whether plant closure motivated by business reasons or anti-union animus – Whether Board deferring to arbitration**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** *Ken Petryshen for the complainant; B. F. MacDonald and T. Kotschorek for the respondent.*

**DECISION OF THE BOARD; March 10 1981**

1. This is a complaint under section 79 of *The Labour Relations Act* in which the complainant alleges that the respondent has breached sections 56 and 58 of the Act. The complaint as originally filed also alleged a violation of section 83 of the Act, but the complainant decided not to pursue that allegation.

2. Since the section 79(4a) “reverse onus” applies only to the alleged breach of section 58 and does not apply to the other allegations contained in the complaint, the Board, after considering the submissions of the parties, called upon the complainant to proceed first with its evidence. The Board’s procedural ruling does not, of course, affect the legal burden of proof. The Board will apply section 79(4a) to those allegations to which it is legally applicable (see *Craftline Industries Limited*, [1977] OLRB Rep. April 246).

3. A total of six witnesses testified before the Board during the three days of hearing of this matter. There were a number of conflicts in the evidence, particularly with respect to the dates on which meetings were held between the representatives of the complainant and the respondent, and the precise matters discussed at such meetings. The Board has resolved those conflicts by assessing the relative credibility of the various witnesses. In making those assessments, the Board has considered a number of factors, including the consistency of their evidence, the firmness of their memories, their ability to resist the influence of interest to modify their recollections, their capacity to express their recollections clearly and their demeanour.

4. The respondent operated a wholesale milk and ice cream distribution business in Windsor for many years. The complainant was the bargaining agent for a bargaining unit of employees of the respondent described as follows in Article 1 of the collective agreement in force between the complainant and the respondent from May 1, 1978 to April 30, 1980 (the “Windsor Branch Plant Collective Agreement”):

“ . . . all employees of the Company employed at its Windsor Branch Plant, save and except supervisors, Foremen, persons above the rank of

Supervisor and Foreman, Engineers, Office and Retail Store Staff, and students employed for less than 90 days.”

The complainant has been the bargaining agent for the employees at the respondent's Windsor Branch Plant for approximately fifteen years. Originally the respondent operated a processing plant in Windsor but that part of the operation was closed about ten years ago. The retail delivery part of the respondent's Windsor operation was subsequently transferred to a franchisee. As a result of those changes, the respondent's Windsor work force declined from approximately 100 to 17.

5. T. F. Kotschorek was hired in September of 1978 as the District Manager of the respondent's London district, which includes its Chatham and Windsor operations. He was subsequently promoted to Vice-President — Western Ontario, before being further promoted to his present position of Vice-President — Corporate Planning, Marketing and Sales. It was his evidence that he was hired to “clean up” as the respondent was “in bad shape in Southwestern Ontario” and was “in a steady decline”. He testified that the plan of the respondent at the time he joined it “was to get the thing on its feet as soon as possible — it was a matter of survival at the time.” Mr. Kotschorek arranged for a special projects manager to do a “three or four week” audit of the respondent's distribution system. Although this was a “very superficial study”, it indicated that there were “some real inefficiencies”. As a result, a new position — Manager of Distribution — was created in April of 1979 and Glenn Lee was promoted to fill it.

6. Improving the profitability of the Windsor Branch Plant operation was one of Mr. Kotschorek's highest priorities. It was his evidence that it was necessary to have a profit contribution of seven per cent to gross sales at each branch in order to provide proper support for the respondent's overall dairy operation. He advised the Board that in 1978, the Windsor Branch was in a loss position and that in 1979, its profit contribution was only .6% to sales. He hoped to obtain a greater rate of return by effecting economies in the Windsor operation.

7. In August of 1979, consultants were retained to conduct a fifteen week study to provide an intensive appraisal and analysis of the respondent's overall distribution and branch operations in southwestern Ontario. The consultants issued weekly reports. Their report for the week ending October 19, 1979 recommended that the respondent's Windsor and Chatham Branches be combined under a system by which all milk interbranch deliveries for the Windsor area would go from London to Chatham (for ultimate delivery in Windsor) instead of directly from London to Windsor. They also recommended route realignments and immediate capital expenditures of \$124,000.00 to purchase the new equipment necessary to implement the recommended changes. The consultants projected annual “labour and fringes” savings of over \$134,000.00 as a result of the realignment of milk, ice cream and interbranch routes which they recommended for Windsor and Chatham.

8. Mr. Kotschorek (in collaboration with Mr. Lee) decided to proceed with the recommended changes. He successfully solicited an “extraordinary capital release” from the Directors of the respondent and placed the first order for new equipment on November 2, 1979. A target date of November 26, 1979 was set for the implementation of the recommendations concerning the Windsor Branch operation. Meanwhile, other parts of the programme not related to Windsor were implemented; the respondent's Teaswater Branch was closed and some changes were made in the London and Kitchener operations.

9. On November 19, 1979, Mr. Lee along with two other members of management (Ross McIntosh — the acting Windsor Branch Plant Manager, and George Bennett — the London District Sales Manager) met with representatives of the complainant to announce the proposed transportation, route and equipment changes. When Mr. Lee informed them that the changes would result in the lay-off of eight or nine Windsor Branch Plant employees, the representatives of the complainant were very upset. They were particularly disturbed by the potential lay-off of the Windsor interbranch drivers. Gerry Kennedy, a business agent of the complainant, told Mr. Lee that there was “no way that it was ever going to happen”.

10. Members of management, including Mr. Lee and Mr. Kotschorek, met on November 22nd to discuss the November 19th meeting. It was decided to proceed with the proposed changes, but to implement them on December 3rd, one week later than previously planned, and to have another meeting with the complainant as soon as possible. Accordingly, a further meeting was held on November 23rd. In attendance at that meeting on behalf of the respondent were Mr. Kotschorek, Mr. Lee and John Houston. Mr. Houston, who had been the respondent's Director of Employee Relations for twenty-six years prior to his retirement in September of 1979, was retained by the respondent as a consultant in early November of 1979 as it was felt that his extensive knowledge concerning the respondent's employee welfare plans would be of assistance in implementing the respondent's plans to effect economies by reducing its work force. Mr. Houston, who served as the respondent's spokesman at the meeting, informed the representatives of the complainant that the respondent had two alternatives — to close out the Windsor operation completely, or to take immediate steps to retrench, realign routes and effect economies of operation. He also told them that as it was the desire of the respondent not to close the operation, the Company had elected to exercise the second option. Mr. Kotschorek confirmed this information and provided the reasons for the proposed changes. The complainant's opposition to the proposals continued to be very strong and vociferous.

11. On November 27th, Mr. Kotschorek was shocked to learn that N & D Supermarkets Ltd. (“N & D”), one of the respondent's major Windsor customers, had decided to eliminate the respondent as the supplier of its “private label” fluid milk. N & D private label sales represented almost twenty per cent of the respondent's total Windsor sales (6.8% of the “total throughput” at the respondent's London processing plant). N & D was also a very important customer in relation to the Windsor Branch Plant's profit position since the large volume private label deliveries to N & D were very efficient. It was decided to delay the implementation of the proposed Windsor Branch changes because those proposals were based upon the continuance of N & D as a customer, and also because of the continuing opposition of the complainant and the nearness of the Christmas period. Substantial efforts, including attendances at N & D by the President and by the Sales Manager of the respondent, were made in an attempt to regain the N & D private label account but those efforts were unsuccessful.

12. The consultants were instructed to review and report to the respondent the options available to it in light of the loss of the N & D private label account. In a report dated December 7, 1979, the consultants indicated that there were two alternatives:

- “1) Maintain an operation center in Windsor. This means then fighting to keep it open with the idea of going after business to compensate for the loss N & D.



- 2) Closing down Windsor and operating out of Chatham. Due to the effect of N & D volume loss to the Windsor operation this may be the most economical approach. The remaining accounts can be serviced adequately and economically from Chatham. In either case some of the small unprofitable or marginal accounts would be transferred to S.A.Y.D. [a franchise].”

In commenting to the Board concerning that report, Mr. Kotschorek said: “They [the consultants] left the choice to us but suggested by innuendo that the second option would be the way to go.” Mr. Kotschorek then requested that the respondent’s “operating people” prepare a “definitive position” on the matter by early January.

13. In response to Mr. Kotschorek’s request, Mr. Lee provided him with the following internal letter dated January 11, 1980:

“After a complete evaluation of the Windsor/ Chatham operation the following are my recommendations:

1. Service Windsor from Chatham regardless if we have or do not have N & D.
2. Servicing from Chatham without N & D there would be three wholesale milk routes, two ice cream routes and two reliefmen. Miss M. Brothers would be transferred to Chatham to eliminate the \$260.00 LJ charge. We would then buy back services from LJ for Saturday work only to answer phones and cashing in procedures.
3. R. Benoit to manage the Chatham operation, R. McIntosh to assist for one to two months until it is stable, then Ross to return to London.
4. The necessary changes in Chatham are as follows:
  - 1) Remove the existing garage.
  - 2) Remove existing barn.
  - 3) Relocate hydro hookups.
  - 4) Update refrigeration in freezer, which needs to be done anyway.
  - 5) Split off a drivers’ room and relocate E. Millie’s office so that the branch manager and the clerk will have offices side by side.
5. *Costs* — one two and three would cost approximately \$5,000. Number four would cost between \$10 — 15,000 and number five would be approximately \$2,000. This will be updated in the near future.”

14. Despite continued efforts by the respondent to regain the N & D private label account, on January 14, 1980, N & D confirmed that it had made a commitment to another supplier and could not reverse its position. However, the respondent was permitted to continue to produce N & D's private label product until the packaging supplies were exhausted, which was projected to, and did in fact occur on February 16, 1980. After that, N & D ceased to be a milk customer but continued to purchase ice cream from the respondent.

15. Having decided to close down the respondent's Windsor Branch operation and service the Windsor customers from Chatham, Mr. Kotschorek caused the following internal letter to be distributed to Mr. Lee and three other members of management on January 14, 1980:

"I have recently completed a meeting with N & D Supermarkets in Windsor on January 11, 1980. This meeting represents the last of a series of meetings that were held between N & D and myself in an effort to reverse their decision on the production of their own private label bag. I was unable to reverse this decision and therefore it was agreed between N & D and Silverwoods that the last shipment of their bags would occur the evening of February 16th.

Effective February 18th Silverwoods will discontinue producing the N & D bag.

By this letter I am requesting that Dave Lavender keep me informed on a weekly basis of the inventory position of N & D's outer bag. With this information would you please provide me with an estimated number of weeks supply this represents,

With regards to the above dates the Windsor/ Chatham distribution plan will be installed February 18th. All parties intimately involved with this installation are to be notified no later than February 11th. This includes of course the Union and the Windsor employees. Glen Lee will have this responsibility.

By this letter I am requesting that PMD [the consultants] contact Mr. Glen Lee to review the Windsor/ Chatham program in detail during the month of January. It is important that this review be completed in January in order to permit Silverwoods sufficient time to make the necessary arrangements, etc.

I trust the above will be implemented as indicated and I cannot stress enough that the confidentiality of this letter be maintained as I do not want the information or our approach to leak out."

16. Management hoped to realize significant economies by consolidating the Windsor and Chatham operations: the Windsor Branch Plant overhead (including rental, electrical and heating expenses) would be eliminated; managerial, clerical and operational personnel would be reduced; and unprofitable or marginal accounts would be transferred to a franchisee. The

interbranch transportation system would also be rationalized by eliminating the anomalous interbranch drivers who operated out of Windsor; all other interbranch drivers for the region operated out of London.

17. In accordance with Mr. Kotschorek's instructions, Mr. Lee arranged for a meeting to be held in Windsor with representatives of the complainant on February 11, 1980. Mr. Houston again served as spokesman for the respondent, although Mr. Kotschorek and Mr. Lee also spoke at the meeting. The complainant's representatives were told at that meeting that the unfortunate loss of the N & D private label account and the unprofitable operation of the Windsor Branch Plant had resulted in a decision to close the Windsor operation effective February 18, 1980 and service the Windsor customers from Chatham. They were also told that there would be eight new positions in Chatham which would be made available to the seventeen Windsor Branch employees on the basis of seniority and ability.

18. Mr. Kotschorek told the Board that the decision was not announced to the complainant until one week before the implementation date because he "wanted to make sure that the details had been worked out", because he was "concerned in such a situation that there might be a misrepresentation of the situation", and because he was trying to "avoid adverse publicity". He also testified that the implementation date was "predicated on the run-out at the N & D [private label] bags — the installation date coincided with the run-out".

19. Mr. Lee met with individual employees on February 12, 1980 to provide information concerning the positions available in Chatham. They were offered a "three week trial time" in the Chatham Branch, the terms of which were described as follows in a letter dated February 15, 1980 to the affected employees:

"This is to confirm our conversation regarding the agreement between Silverwood and yourself as to the 3 week trial time in the Chatham Branch,

(a) If within the first three weeks starting February 18th, 1980 you change your mind and want to take either an early retirement or terminate your employment with Silverwoods, Silverwood will grant all monies owing according to the Employees Standard Act [sic] as we would have at the time of the closure of the Windsor Branch.

b) It is also agreed between Silverwood and yourself that in the event you do not wish to work in the Chatham Branch, you will give Silverwood at least full week's notice."

20. A number of the senior employees elected to take an early retirement or termination pay (under *The Employment Standards Act, 1974*) rather than transfer to Chatham. (It was the unrefuted evidence of Mr. Kotschorek that "it has been the [respondent's] policy to give pay in lieu of notice since [he has] been with the Company". The Teaswater employees were also given pay in lieu of notice when that Branch was closed by the respondent.)

21. Those former Windsor employees who did accept positions in Chatham were covered by the collective agreement (in force from December 1, 1978 to November 30, 1980) between the complainant and the respondent in respect to the following bargaining unit:



“...all employees of the [respondent] employed at or working out of its plant in Chatham, save and except Plant Superintendent, Chief Engineer, Sales Manager, Route Foreman, persons above the rank of Route Foreman and Foremen [sic], office staff, persons regularly employed for not more than 24 hours per week, and students employed for less than 90 days.”

Although the rates of remuneration specified in that collective agreement were lower (by about \$6.00 per week) than those specified in the Windsor Branch Plant Collective Agreement, the wages of the eight employees who accepted transfers to Chatham were “red circled” so as to remain at their former levels until the rates under the Chatham Branch Collective Agreement rose to similar levels. They lost their plant seniority but retained their individual seniority dates for purposes of vacation pay and pension entitlement.

22. As of February 18, 1980, those eight employees began to service the respondent’s Windsor customers from Chatham by obtaining their milk and ice cream in Chatham instead of Windsor. The milk delivery routes were modified substantially but the ice cream routes remained unchanged. Although the new routes, which had Chatham as their starting point had some overtime built into them, a number of the drivers worked considerably more overtime than had been anticipated by management. Moreover, the respondent had not expected that many of the senior employees would elect to receive termination pay rather than to accept a transfer to Chatham. Thus, it appears that the economies actually realized by the respondent were not as large as had been anticipated. Nevertheless, some improvement in the profitability of the operation did result.

23. On February 26, 1980, Mr. Kotschorek became aware for the first time that the respondent was going to purchase the Windsor milk and ice cream wholesale business of Borden Dairy, Division of Borden Company Limited (“Borden”) on March 1, 1980 as part of a major acquisition. It was Mr. Kotschorek’s evidence that all of the negotiations concerning such an acquisition are conducted by Silverwood Industries Ltd., a holding company which owns a number of large businesses including the respondent, Silverwood Dairies. He further testified that the existence of such negotiations is not disclosed to persons in positions such as his until the purchase has been approved by the Board of Directors of Silverwood Industries Ltd. Counsel for the complainant submitted that “it is simply incredible to contend that the London management were unaware of the probable sale of Borden’s when the decision to close the Windsor Branch was made.” However, we reject that submission and accept the candid and credible testimony of Mr. Kotschorek that he had no knowledge prior to February 26, 1980 of the prospective purchase. The plausibility of that evidence is supported by the credible testimony of Mr. Houston who told the Board on the basis of his extensive experience with the respondent that “when these types of acquisitions are made, they are kept very secret by the senior officials in the Company and held very tightly.”

24. The aforementioned purchase took place on March 1, 1980. As a result of that transaction, the respondent became bound by a collective agreement (the “Borden Collective Agreement”) between Borden and Retail, Wholesale and Department Store Union Local 440, A.F.L., C.I.O., C.L.C. (“Local 440”). Between February 18, 1980 and July 20, 1980, the number of former Windsor employees working for Silverwood in Chatham dropped from eight to five as a result of resignations. At least one of the former Windsor employees applied for employment at the Borden Windsor Plant during that period but was not hired.

On July 21, 1980, the respondent integrated that part of its Chatham-based wholesale milk and ice cream distribution business which serviced Windsor area accounts, with the Windsor wholesale milk and ice cream distribution business which it had purchased from Borden. In so doing, it transferred those five employees and integrated them and the customers which they serviced into the Windsor wholesale milk and ice cream business which it had purchased from Borden. As a result, the work force of the business rose from sixteen to twenty-one employees. By decision dated October 14, 1980 in File No. 0912-80-R (*Silverwood Dairies*, [1980] OLRB Rep. Oct. 1526), the Board found that an intermingling had occurred within the meaning of section 55(6) of the Act, and after determining appropriate full-time and part-time bargaining units, directed that a representation vote be taken of the employees in the full-time bargaining unit to determine whether they wished to be represented by the complainant or by Local 440. Since more than fifty per cent of the ballots cast were cast in favour of Local 440, the Board declared Local 440 to be the bargaining agent for the bargaining unit in a decision dated March 4, 1981.

25. The complainant contends that the closure of the Windsor Branch Plant and the temporary servicing of the Windsor accounts from Chatham was designed by the respondent to prejudice the complainant's rights under *The Labour Relations Act* (particularly section 55) and ultimately to remove the complainant as the bargaining agent for the respondent's Windsor employees.

26. The complainant also relied upon a letter of understanding dated September 29, 1978 from Mr. Houston (who was at that time the respondent's Director of Employee Relations) to Mr. Kennedy. Paragraph eight of that letter reads as follows:

"8. *Delivery Arrangements*

The company does not intend to make any change during the term of the present agreement, in the arrangement whereby Windsor Branch employees make deliveries in the Windsor market.

The foregoing understanding will continue in effect until April 30, 1980."

That letter was signed by Mr. Houston and was also signed by two officials of the complainant in acknowledgement of the complainant's acceptance of the understanding.

27. Counsel for the complainant contended that the letter of understanding formed part of the Windsor Branch Plant Collective Agreement. He further contended that the closure of the Windsor Branch Plant was a flagrant violation of paragraph eight of that letter, which violation seriously undermined the complainant, and could, in his submission, properly be considered as evidence of anti-union motivation.

28. Mr. Kennedy, an experienced business agent of the complainant who serviced the bargaining unit under the Windsor Branch Plant Collective Agreement (and its predecessors) for fifteen years and served as the complainant's chairman for negotiations concerning that agreement and its predecessors, testified that the letter of understanding was negotiated along with the collective agreement but was not prepared until after the collective agreement was signed. It was his evidence that it "was always the practice of [the respondent] and [the complainant] that some articles not contained in the collective agreement were attached to it"

in the form of a letter of understanding because the letter “covered things which [the respondent] did not have in its collective agreement.”

29. Mr. Houston was also involved in the negotiations which gave rise to the letter of understanding. It was his evidence that the letter was given in response to the complainant's concerns about the continuation of the respondent's operation in the Windsor market. He told the Board: “We couldn't give a blanket assurance but we did give the letter saying that we had no present intention of changing the arrangements whereby Windsor Branch employees made deliveries in the Windsor market.” He conceded that it was not negotiated separately but rather “was part of the main negotiations” and “was merely a matter which [the respondent] didn't feel should be included in the collective agreement”. It was his view that the closure of the respondent's Windsor Branch Plant did not violate the understanding contained in paragraph eight of that letter “because Windsor employees continued to make deliveries in the Windsor area, albeit they had to do it from Chatham.”

30. The complainant did not at any time attempt to file a grievance alleging that the respondent's closure of the Windsor Branch Plant constituted a breach of the collective agreement of the letter of understanding. In fact, the evidence does not indicate that the possibility that the closure might be in breach of the collective agreement was ever raised with the respondent at any time (prior to the hearing of this matter) by the representatives of the complainant. Mr. Kennedy's explanation for the failure to grieve was as follows:

“We sought legal advice. It just happened this way. Unfortunately we were involved in too many other things on this close-out. We sought advice prior to March 1st, in the latter part of February. We were not told or advised not to file a grievance. It was probably my misjudgment which resulted in a grievance not being filed at that time.”

31. An employer who closes his plant, relocates or takes any other major business decision to avoid being bound by a collective agreement, to avoid having to deal with his employees collectively through a trade union or to avoid the possibility of being subject to economic sanctions is guilty of an unfair labour practice (see, for example, *Westinghouse Canada Limited*, [1980] OLRB Rep. Oct. 577; *Academy of Medicine*, [1977] OLRB Rep. Dec. 783; and *Humpty Dumpty Foods Limited*, [1977] OLRB July 401). However, if a business decision which has an adverse effect on a trade union is not in any way motivated by anti-union considerations, the employer's action is not restricted by *The Labour Relations Act* (see *Westinghouse Canada Limited*, *supra*, at paragraph 64; and *Skyline Hotels Limited* [1980] OLRB Rep. Dec. 1811).

32. Although the Board may defer to arbitration where a section 79 complaint alleges that an employer has breached a collective agreement provision, in appropriate circumstances the Board will determine whether the employer's action, which is alleged to be an unfair labour practice, constitutes a violation of its collective agreement with the trade union. It *Westinghouse Canada Limited*, *supra*, paragraph 35, the Board stated:

“Section 42 of the Act provides:

‘A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the



agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.'

The long-standing practice of this Board has been to defer to the arbitration procedures established under section 37 of the Act to resolve all differences between the parties arising from the interpretation, application, administration and alleged violation of a collective agreement when complaints of this type have been brought under the Act. Where the complaint involves both the alleged unfair labour practice the Board has maintained its practice of deferral where satisfied that the merits of both the alleged collective agreement breach and the alleged unfair labour practice can be dealt with at arbitration. The Board made it clear in *Selinger Wood Ltd.* [1979] OLRB Rep. June 574, however, that where there is an alleged unfair labour practice and related breach of the collective agreement which, if proven, would constitute a defacto repudiation of the trade union the Board will assess the employer's conduct vis-a-vis his obligation under the collective agreement. Where an employer's conduct constitutes a flagrant and massive violation of the agreement, and has the effect of seriously undermining a trade union, the Board may consider the employer's actions as evidence of an anti-union motivation. In assessing the employer's conduct the Board may be required to put its mind to the terms of the collective agreement."

(See also *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254.)

33. Although it is arguable that the respondent's action of closing its Windsor Branch Plant may have violated paragraph eight of the letter of understanding and that the letter of understanding may have formed part of the Windsor Branch Plant Collective Agreement, we are not satisfied that the present complaint is an appropriate case for the Board to remedy under section 79 the complainant's failure to file a grievance and (if necessary) to refer it to arbitration. The complainant has not provided a satisfactory explanation for its failure to grieve this matter and has not suggested that the merits of the alleged collective agreement breach (which, it is alleged, also constitutes an unfair labour practice) could not have been dealt with fairly, promptly and effectively through the grievance and arbitration procedures under the Windsor Branch Plant Collective Agreement. Moreover, even if the respondent's action did violate the collective agreement, we are nevertheless satisfied on the basis of all the evidence before us that the closure of the Windsor Branch Plant was motivated by *bona fide* business concerns and was not in any way motivated by anti-union considerations. Accordingly, this is not a case in which a finding by the Board that the respondent had breached the collective agreement by closing the Windsor Branch Plant would lead the Board to infer that the closure was motivated by anti-union animus, as the evidence taken as a whole negates any such inference.

34. Mr. Kennedy noted in his evidence that the Borden Collective Agreement contains a "base and commission structure" for all drivers while the Windsor Branch Plant Collective Agreement contains an "hourly rate structure" for milk drivers and a base and commission structure for ice cream drivers. In his examination-in-chief, he testified that he "would think" that the respondent "prefers a base and commission structure". He further testified that "this

has come up during negotiations". However, he later admitted that the respondent "hasn't done anything" to demonstrate that it prefers a base and commission structure to an hourly rate structure. He also conceded that since 1971 when the respondent agreed to incorporate an hourly rate structure into its Windsor Branch Plant Collective Agreement, "there was never any proposal by the [respondent] to change this" or "to go back to a commission structure". The evidence also indicates that which of the structures generates the larger amount of remuneration depends upon the volume of sales. The respondent's Windsor employees who accepted transfers to Chatham continued to be paid the hourly rate structure under the Windsor Branch Plant Collective Agreement. Moreover, the evidence indicates that the Chatham Branch Collective Agreement (between the complainant and the respondent) which would ultimately have determined their terms and conditions of employment if they had continued working out of Chatham, also contained an hourly rate structure. Having regard to those facts and to all the other evidence before us, we are satisfied that the respondent did not close its Windsor Branch Plant for the purpose of replacing the hourly rate structure under its Windsor Branch Plant Collective Agreement with the base and commission structure under the Borden Collective Agreement, or for the purpose of escaping any of its other obligations under the Windsor Branch Plant Collective Agreement. The respondent's actions were motivated solely by *bona fide* business considerations devoid of any anti-union animus.

35. For the foregoing reasons, this complaint is hereby dismissed.

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**0287-80-M; 1178-80-M; 1179-80-M; 1180-80-M; 1181-80-M; 1183-80-M; 1184-80-M; 1185-80-M; 1684-80-M; 1685-80-M; 1685-80-M; 1686-80-M; 1687-80-M; International Union of Operating Engineers, Local 793, Applicant, v. Sinclair Welding Limited, Respondent.**

**Section 112a – Whether respondent failed to hire union members in good standing – Union conduct leading respondent to believe it need not observe collective agreement – Whether union estopped – Whether filing of grievance ended estoppel**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**APPEARANCES:** *S. B. D. Wahl, P. Gauthier and G. Steers for the applicant; K. W. Kort and Frank Wiles for the respondent.*

**DECISION OF THE BOARD;** March 10, 1981

1. These are a number of grievances which were referred to the Board for final and binding determination.

2. The respondent is located in Belleville, Ontario. It is engaged in a variety of operations, some of which involve work in the construction industry. The firm owns and

operates two cranes. These cranes are used for non-construction work, for work in the industrial, commercial and institutional sector of the construction industry ("the ICI sector") and for work in other sectors of the industry. The day to day operations of the company are managed by its president and major shareholder, Mr. Franklin Wiles.

3. The background to these matters is somewhat complicated, but relevant to the defences put forward to the grievances by the respondent. On or about May 9, 1979, Mr. Wiles was visited by Mr. Graham Steers, a business representative of the applicant in the Belleville area. At the relevant time, two crane operators employed by the respondent were already members of the applicant, a fact which everyone concerned was apparently aware of. Mr. Miles, and another employee who frequently operated a crane, Mr. E. F. Mitchell, had earlier in their careers both been members of the applicant, although apparently not while associated with the respondent. Mr. Steers proposed to Mr. Wiles that he sign a collective agreement with the applicant. Mr. Wiles indicated that he was prepared to consider doing so provided both he and Mr. Mitchell were taken back into membership in the union. To this Mr. Steers replied that for a total of \$240.00 both Mr. Wiles and Mr. Mitchell could be reinstated into membership. Mr. Wiles then handed Mr. Steers \$240.00 and Mr. Steers in turn left Mr. Wiles with a draft collective agreement. On the following day, Mr. Wiles telephoned Mr. Steers and advised him that he would not sign the collective agreement without certain changes being made to it, something which Mr. Steers was not prepared to consider. On May 11th, Mr. Steers returned the \$240.00 to Mr. Wiles. Neither Mr. Mitchell nor Mr. Wiles were formally reinstated into membership in the union. It is not clear from the evidence whether Mr. Mitchell or Mr. Wiles were rejected for membership by the union or whether because no collective agreement had been signed there was a mutual understanding that the earlier arrangement with respect to Wiles and Mitchell's membership no longer applied.

4. On the same day that Mr. Steers returned the \$240.00 to Mr. Wiles, the applicant filed an application for certification with the Board. On June 4, 1979, the Board certified the applicant for certain employees of the respondent, including those engaged in the operation of cranes. By force of the province-wide bargaining provisions of the Act (enacted as 1977 c.31), the respondent automatically became bound by the Operating Engineers' provincial agreement in the ICI sector. Although the agreement itself purports to cover a number of sectors, at the hearing the parties agreed that it was binding on the respondent only with respect to the ICI sector.

5. Mr. Wiles testified that following the certification of the applicant he was advised by a lawyer that the respondent was automatically bound to the provincial agreement in the ICI sector. Mr. Wiles, who at one time prior to the enactment of the province-wide bargaining provisions of the Act had been responsible for administering a collective agreement, doubted the accuracy of the lawyer's advice. For his part, Mr. Steers appears to have been totally unaware of the province-wide bargaining provisions of the Act and unaware of the fact that the respondent was automatically bound by the provincial agreement in the ICI sector.

6. On June 14, 1979, Mr. Steers attended at the respondent's premises to discuss signing a collective agreement, but nothing was resolved. Subsequently, the applicant asked the Minister to appoint a conciliation officer, and on July 11, 1979 a meeting was held between the parties with a conciliation officer present. Nothing was resolved at this meeting. On August 3, 1979, the Minister indicated that he would not be appointing a conciliation board. On August 18, 1979 the employees of the respondent outside the ICI sector covered by the



Board's certificate were in a legal position to strike. However, since the ICI sector was already covered by a subsisting collective agreement, employees working in this sector were not in a legal strike position.

7. On September 19, 1979 Mr. Steers and a number of other persons began to picket in front of the respondent's premises. The two employees who belonged to the applicant trade union refused to cross the picket line. Mr. Steers was overheard telling the two union members not to cross the line, and also that they should not work for the respondent even when no picketers were present. As already noted, Mr. Steers was apparently unaware of the fact that the provincial agreement already covered the respondent's employees in the ICI sector, accordingly, he did not distinguish that sector from the others. Pickets also began to appear at the respondent's job sites, including sites in the ICI sector. Picketing activity continued on a regular basis through the month of October, 1979. Partway through October, both of the employees who belonged to the applicant union informed the respondent that they were quitting its employ to obtain work elsewhere. The applicant's picketing activity became increasingly sporadic in November, and by late December of 1979 it had ceased altogether.

8. In January, 1980, Mr. Mitchell applied to the Board to have the applicant's bargaining rights terminated (File No. 1914-79-R). The matter came on before a differently constituted panel than the one seized of these matters. It is agreed that at the hearing into the termination application, the members of the Board panel explained to the parties that they were bound to the provincial agreement in the ICI sector. In a written decision released on February 4, 1980, the Board again stated this to be the case. The Board also dismissed the termination application in its entirety. The application was clearly untimely with respect to the ICI sector, and with respect to the other sectors, because of Mr. Wiles involvement with the application, the Board was not prepared to conclude that it was a clearly voluntary application on the part of Mr. Mitchell.

9. Apart from both being in attendance at the hearing into the termination application, the applicant and respondent had no involvement with each other from late January, when the applicant completely stopped its picketing activity, until March of 1980. On March 10, 1980, the applicant sent a grievance to the respondent. The grievance (subsequently referred to the Board in File No. 0287-80-M) related to a job site on Jamieson Bone Road in Belleville, where Mr. Mitchell had been operating a crane used in the erection of a pre-engineered building for a transport firm. The work clearly came within the ICI sector. The grievance stated as follows:

"The nature of the grievance is as follows: The employer has failed or refused to employ members of the Union in good standing for work covered by the collective agreement and to call the Union Office whenever personnel are required.

Remedy requested: That the employer replace all personnel who are not in good standing with the Union with those who are and further that the employer pay to the I.U.O.E. Local 793 in trust, all wages and other monetary items set out in the collective agreement for all hours earned by personnel not in good standing with the Union."

On June 3, 1980, the applicant filed a second grievance with the respondent, and subsequently

the other grievances followed. The grievances all contain wording similar to the one quoted above, although they each relate to different job sites.

10. The provisions of the provincial agreement upon which the applicant primarily relies are set out below:

*"Article 3 - Union Security*

- 3.1 a) The Employer shall first call the Union Office whenever personnel are required. If the Union cannot supply such personnel within 48 hours, excluding Saturdays, Sundays and Holidays, the Employer may secure such personnel from any other source. The Employer may recall former regular employees through the Union Office who have been absent from the Employer up to six (6) months.
- b) Regular employees shall be defined as employees hired at the Employer's home base and who have been on the Employer's payroll for six (6) months or more.
- 3.2 All personnel hired shall be required to have a clearance card issued by the Union before they start to work, unless other arrangements are made with the Union dispatcher. Such clearance card will not be unreasonably withheld.
- 3.3 Employees working under this Agreement shall be members of the Union in good standing, or make application to become members of the Union within seven days of hiring or be replaced upon written request by the Union."

11. With respect to the jobs referred to in the majority of the grievances, the respondent acknowledges that its cranes were not operated by union members but rather by either Mr. Mitchell or Mr. Wiles. However, the respondent contends that the provisions of the collective agreement set out above have not been violated, or in the alternative if they have, then having regard to the applicant's conduct it would be unfair to award any damages to the applicant.

12. In support of this latter contention, the respondent relies on the fact that Mr. Steers, on behalf of the applicant, directed two crane operators belonging to the union not to work for the respondent, and further picketed the respondent's job sites, including those in the ICI sector. At the hearing, counsel for the applicant contended that even if this conduct on the part of the applicant had been improper, nevertheless, the applicant's conduct could not serve to amend the collective agreement so as to do away with the respondent's obligations under the agreement.

13. To all intents and purposes, the applicant's conduct after it was certified indicated very clearly that it did not regard itself as bound by the provincial agreement insofar as the respondent was concerned. At law, the applicant and the respondent did in fact remain bound to the agreement, and the applicant's conduct cannot be viewed as having amended the agreement in any way. Nevertheless, in our view, because of its conduct it would inequitable for the applicant to now obtain damages for a period of time when the respondent reasonably

believed it need not conform with the terms of the agreement. During this time period, the pre-conditions for the application of the principle of estoppel were clearly present. See: *Canadian General Electric Co. Ltd.* (1971), 22 L.A.C. 149 (Johnston).

14. As already indicated, the application of the principle of estoppel does not have the effect of amending a collective agreement. Rather, what it does do is prevent a party from enforcing its strict rights under the agreement when, because of its own conduct, it would be inequitable to allow it to do so. This being the case, notice of a reversion to the strict terms of the agreement will generally bring the estoppel to an end. Further, arbitrators have generally adopted the position that the filing of a grievance will usually be sufficient notice of a reversion to the strict terms of the agreement. See: *Hydro-Electric Power Commission of Ontario* (1975), 8 L.A.C. (2d) 276 (Schiff). Here, the applicant's first grievance, that dealing with the Jamieson Bone Road project, indicated very clearly that the applicant wanted the terms of the provincial collective agreement applied to work performed by the respondent. In our view, the effect of this grievance was to bring the estoppel to an end since from this point on the respondent was aware of the applicant's intention to rely on the terms of the collective agreement. In all of the circumstances then, we are of the view that the applicant is estopped from now claiming any damages as a result of the respondent's non-compliance with the provincial collective agreement either prior to or on the Jamieson Bone Road project, but that the grievance filed with respect to that project served to bring the estoppel to an end.

15. Quite apart from the matters raised above, the respondent contends that the terms of the collective agreement did not require it to use members of the applicant union in place of Mr. Mitchell, in that he was already an employee when the respondent became bound by the collective agreement. Article 3.1 of the provincial collective agreement, which is set out above, states that "The Employer shall first call the Union office whenever personnel are required.". We agree with the respondent's contention that this article relates to new hirings and did not apply to Mr. Mitchell, who was already in the respondent's employ. In our view, the article cannot reasonably be interpreted as requiring the respondent to discharge Mr. Mitchell and replace him with someone from the union.

16. Article 3.2 of the agreement provides, in part, that "All personnel hired shall be required to have a clearance card issued by the Union before they start to work ...". Mr. Mitchell was working for the respondent prior to the respondent becoming bound to the agreement, and accordingly, this article is likewise not applicable to him.

17. The final article of the agreement relevant to Mr. Mitchell's situation is article 3.3 which provides that employees working under the agreement shall be union members in good standing, "or make application to become members of the Union within seven days of hiring or be replaced upon written request by the Union". It is not disputed that Mr. Mitchell worked on ICI projects covered by the agreement at a time when he was not a union member in good standing. The respondent, however, contends that Mr. Mitchell fulfilled the requirements of the article in that on May 10, 1979 he made an application to become a member of the union. Even if it were to be assumed that Mr. Wiles' action in tendering \$240.00 to Mr. Steers for the purpose of having himself and Mr. Mitchell reinstated into the union could be construed as an application for membership by Mr. Mitchell, assuming also that the reference to the application being made within seven days of hiring had no application to Mr. Mitchell, we are of the view that the tender of the money on May 10, 1979 did not fulfill the requirements of article 3.3. When Mr. Wiles tendered the money to Mr. Steers, the applicant



had no bargaining rights with respect to the respondent's employees, and the respondent was not bound by the terms of the collective agreement. It was only later that the agreement became binding on the respondent. In our view, actions prior to the collective agreement becoming binding on the respondent cannot be treated as later fulfilling the requirements of the collective agreement. Indeed, it is possible that if, subsequent to the applicant's decision to begin enforcing the collective agreement, Mr. Mitchell had made a personal application to renew his membership in the union, his application may well have been accepted.

18. On the basis of our reasoning set out above, we are satisfied that Mr. Mitchell was neither a member in good standing of the union, nor had he made an application to become a member of the union under article 3.3. Pursuant to article 3.3, this meant that the applicant had the right to require in writing that Mr. Mitchell be replaced. It is the respondent's contention that no such written request was ever made since the applicant never sent a formal letter to the respondent containing such a demand. We would note, however, that in the first grievance filed by the applicant, namely that related to the Jamieson Bone Road project, the applicant complained that the respondent had failed to employ members of the union and specifically requested that the respondent "replace all personnel who are not in good standing with the Union with those who are". Mr. Mitchell was the crane operator on this site, and Mr. Wiles was well aware of the fact that the grievance related directly to him. Accordingly, we are satisfied that the grievance served as a written request by the union that Mr. Mitchell be replaced, so as to make his continued employment on other projects within the ICI sector a violation of the collective agreement.

19. On most of the job sites referred to in the grievance, Mr. Mitchell acted as the crane operator. However, on some of the sites, the crane was operated by Mr. Wiles himself. As noted earlier, Mr. Wiles is the president of the respondent and its majority shareholder. In our view, his is not an "employee" for either the purposes of *The Labour Relations Act* or the collective agreement, and accordingly was not affected by the union security requirements contained in article 3.3. However, article 2.2 of the agreement provides that "The onsite operation, repair, maintenance and servicing of all equipment listed in this agreement (which includes the respondent's cranes) shall be performed by a member of the Union...". The purpose of this provision appears to be to preserve as much work as possible for the applicant's members as opposed to having it performed by non-union members outside of the bargaining unit. We are satisfied that the operation of cranes by Mr. Wiles, a non-union member outside the bargaining unit, was in violation of article 2.2 of the agreement. However, for reasons detailed earlier, we feel that the applicant is estopped from claiming any compensation as a result of any possible violations of this article with respect to the Jamieson Bone Road project, although its grievance filed with respect to the project served to bring the estoppel to an end.

20. Having regard to our conclusions set out above, we are of the view that the applicant can seek compensation for violations of the collective agreement subsequent to the Jamieson Bone Road project which involved the operation of a crane by either Mr. Mitchell or Mr. Wiles on an ICI job site in the construction industry. Since the respondent is bound by the provincial agreement only with respect to jobs in the ICI sector, no violation of the collective agreement could have arisen with respect to non-ICI jobs. We turn now to consider the individual grievances filed with respect to the respondent's various jobs. We would note that with respect to certain of the grievances, we have concluded that compensation is owing to the applicant. Although the applicant did produce a set of figures with respect to the compensation it was claiming, neither party made detailed submissions concerning how the

various provisions in the agreement relating to wages and payments to various funds should be interpreted. In these circumstances, we have simply calculated the relevant amounts as best we could. In his final submissions, counsel for the applicant contended that the respondent should be directed to pay interest on delinquent contributions to both a health plan and a pension plan. Article 24.4 of the provincial agreement provides that the trustees of the plans *may* charge interest for delinquent contributions provided the employer has received prior written notice to correct the delinquency. There is no evidence before us to indicate that the trustees decided to charge interest on the respondent's delinquent payments or that the respondent received the required prior written notice. Accordingly, we have made no order with respect to interest payments.

21. *Re: File No. 0287-80-M* - This grievance involves the Jamieson Bone Road project. As indicated earlier, we are satisfied that the applicant is estopped by its own conduct from making any claim against the respondent with respect to this project. The grievance is accordingly dismissed.

22. *Re: File No. 1178-80-M* - This grievance arises out of the use of a crane to enable two men to repaint light standards in the parking lot at the Quinte Shopping Mall in Belleville. The light standards were installed and given their original coat of paint some five years ago when the mall was under construction. In our view, the type of work involved here was maintenance work, and not work within the construction industry as defined in section 1(1)(f) of the Act. Accordingly, the provincial agreement was not binding on the respondent with respect to this type of work. The grievance is therefore dismissed.

23. *Re: File No. 1179-80-M* - This grievance arises out of the use of one of the respondent's cranes by Mr. Mitchell. Mr. Mitchell received permission from the respondent to borrow the crane. He used the crane to unload some pre-cast concrete from a truck and place it in a gravel pit. Mr. Mitchell in his personal capacity had purchased the concrete from a firm called Stanley Structures in hope of reselling it later, presumably at a profit. The gravel pit is owned by one of Mr. Mitchell's friends. On these facts we are satisfied that the crane was not being used as part of the respondent's business and, further, that it did not involve work in the construction industry. Accordingly, the work was not covered by the provisions of the provincial agreement and the grievance is therefore dismissed.

24. *Re: File No. 1180-80-M* - This job involved work performed by the respondent for two different firms on what was referred to as the "Dussek Brothers" job site. The work was connected with the erection of a steel building, apparently to be used for industrial purposes. We are satisfied that this project came within the ICI sector and was covered by the terms of the provincial agreement.

25. Mr. Wiles operated one of the respondent's cranes on the site for two and one-half hours on June 17, 1980, for five and one-quarter hours on July 16, 1980, and for one-half hour on July 18, 1980. The combined effect of articles 15.1 and 16.1 of the collective agreement is to require that any hours actually worked prior to 8:00 a.m. and after 4:30 p.m. (referred to in the agreement as "regular assigned hours"), be paid at the rate of double time. On this project, one-half hour on July 16th was worked after 4:30 p.m. and on July 18th, one-half hour was worked prior to 8:00 a.m. We are satisfied that these two time periods should have attracted pay at double time rates. Further, pursuant to article 19.1, if the respondent had employed a union member to operate the crane on each of these days it would have been required to either

provide him with eight hours' work, or in the alternative, to pay him for eight hours. In these circumstances, we are of the view that compensation for breach of the collective agreement should be calculated on the basis of eight hours' pay each day.

26. On the evidence, we are of the view that with respect to the Dussek Brothers job site the respondent violated the provincial agreement. As a result, it is directed to pay to the applicant, in trust for distribution to the appropriate funds and to its members who were employed at the relevant time (less any appropriate dues deductions), the following amounts:

For wages	\$343.92
vacation pay	34.39
employee health plan	7.20
employee pension plan	16.80
employer labour relations fund	0.41
joint apprenticeship committees	0.48

TOTAL      \$403.20

27. *Re: File Nos. 1181-80-M and 1184-80-M* - These files both involve work done for Trenton Machine Tools. One of the jobs involved work done at Trenton Machine Tools' own premises. Here a crane was used to help lift a machine out of a building and replace it with a larger machine. There is no evidence before us that either of the machines were affixed to the building such as to become part of the realty. This being the case, we are unable to conclude that the work came within the construction industry so as to be covered by the provisions of the provincial agreement.

28. Other work performed for Trenton Machine Tools, however, did clearly involve work within the ICI sector of the construction industry, namely renovations to a furniture warehouse at the Eden Furniture job site and repairing silos at the Quaker Oates job site. On these sites cranes were operated by either Mr. Mitchell or Mr. Wiles on the following days;

June 18th, four hours, of which one and one-half hours were outside regular hours;

July 5th, two hours, one-half hour outside regular hours;

July 9th, three and one-half hours;

July 10th, one-half hour outside regular hours;

July 21st, three hours, all of them outside regular hours;

July 30th, eight and one-quarter hours, two and one-quarter hours outside regular hours;

July 31st, two and three-quarter hours;

August 6th, eight and one-half hours, one-half hours outside of regular hours;



August 7th, ten and one-half hours, two and one-half hours outside of regular hours;

August 8th, nine hours, two hours outside regular hours;

August 11th, eight hours, two hours outside regular hours;

August 12th, eight hours, three hours outside regular hours;

August 13th, eight hours, two hours outside regular hours;

August 14th, eight hours, two hours outside regular hours; and

August 15th, eight hours, five hours outside regular hours.

Having regard to these facts, we direct the respondent to pay to the applicant, in trust for distribution to the appropriate funds and its members who were unemployed at the relevant times (less any appropriate dues deductions), the following amounts:

For wages	\$2,085.01
vacation pay	208.50
employee health plan	37.27
employee pension plan	86.97
employer labour relations fund	4.57
joint apprenticeship committee	2.48
<b>TOTAL</b>	<b>\$2,424.80</b>

29. The applicant contends that it is entitled to additional compensation with respect to one of the Trenton Machine Tools' jobs, in that Mr. Wiles acted as an equipment foreman on the job, and the collective agreement provides that an equipment foreman must be a union member. The evidence, however, falls far short of establishing that Mr. Wiles performed the duties of an equipment foreman, and accordingly, this part of the applicant's claim is dismissed.

30. *Re: File No. 1183-80-M* - This grievance involves the use of a crane to install the floor of a new barn located on a working dairy farm. Counsel for the respondent contended that because of the agricultural overtones of the project, the job did not come within the ICI sector. Section 106(e) of the Act contains a list of sectors, and includes, in addition to the ICI sector, the residential sector, the sewers and watermain sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector. It appears to us that the construction of a barn on a commercial farm fits much more logically into the ICI sector than in any of the other sectors listed. Although section 106(e) does not purport to contain an exhaustive list of all possible sectors, there is nothing before us either in terms of the work characteristics involved or construction industry practice which would justify us viewing construction work on non-residential buildings on commercial farms as appropriately being part of a separate and distinct sector of the construction industry. This being the case, we are of the view that the work performed by the respondent's employees was work within the ICI sector.

31 The evidence establishes that one of the respondent's cranes was used on the barn project while being operated by a non-member of the applicant on the following days:

August 11th, twelve hours, four and one-half hours outside regular hours;

August 12th, thirteen and one-half hours, five hours outside regular hours; and

August 13th; eleven hours, three hours outside regular hours.

In these circumstances, we direct the respondent to pay to the applicant, in trust for distribution to the appropriate funds and to its members who were unemployed at the relevant time (less any appropriate dues deductions), the following amounts:

For wages	\$702.17
vacation pay	70.22
employee health plan	10.95
employee pension plan	25.55
employer labour relations fund	1.83
joint apprenticeship committee	0.73

TOTAL \$811.45

32. *Re: File No. 1185-80-M* - This grievance arises out of work performed on a temporary office building to be used by Northern Telecom, as well as the installation of air conditioners on the roof of another building. We are satisfied that this work came within the ICI sector. A crane was operated by a non-member of the applicant union on the following days within the time period claimed in the grievance.

May 29th, 1980, six and one-half hours;

May 30th, eight hours;

June 3rd, three and one-half hours;

June 16th, seven and one-quarter hours, one-half hour outside regular hours;

June 18th, nine hours; one hour outside regular hours;

June 8th, two hours; and

August 27th, two and one-half hours, one-half hour outside regular hours.

We accordingly direct the respondent to pay to the applicant, in trust for distribution to the appropriate funds and to its members who were unemployed at the relevant time (less any appropriate dues deductions), the following amounts:

For wages	\$845.47
vacation pay	84.55
employee health plan	17.10
employee pension plan	39.90
employer labour relations fund	1.94
joint apprenticeship committee	1.14
<b>TOTAL</b>	<b>\$990.10</b>

33. *Re: File No. 1684-80-M* - This grievance arises out of work connected with the construction of a new dam. The two witnesses who testified with respect to this project indicated that although they were not certain, they believed that the dam was being built for the Trent-Severn Waterway Commission. On the evidence before us, we are satisfied that the work on this project was within the heavy engineering and not the ICI sector. This grievance is accordingly dismissed.

34. *Re: File No. 1685-80-M* - This grievance involves work performed for K-Line Maintenance & Construction Limited at the Mobil Chemical Plant in Belleville. It appears to have involved the installation of both aluminium towers to hold electrical equipment and the electrical equipment itself. There is nothing in the evidence to indicate whether K-Line had been retained to do work by Mobil Chemical or the local hydro-commission. If the towers and electrical apparatus were being installed for the local hydro-electric commission, then the work would clearly have been within the electrical power systems sector. In the result, we are of the view that the applicant has not established that the work in question was within the ICI sector. The grievance is accordingly dismissed.

35. *Re: File No. 1686-80-M* - This grievance arises out of the use of a crane to install both a light mounted on a pole as well as a transformer in a parking lot owned by the Town of Belleville. At the time, the parking lot was being extended. The work was performed for the Belleville Public Utilities. There is nothing in the evidence to indicate whether the parking lot was connected with a particular building or building project or whether it was a municipal parking lot meant to service a general area of the town. The type of work performed on the site is not generally regarded as work coming within the ICI sector. It might be argued that if the parking lot was being extended in connection with the construction or alteration of an immediately adjacent building, the entire project, including the parking lot, should be treated as coming within the ICI sector. However, as already indicated, there is no evidence linking the parking lot with any particular building. This being the case, we are not satisfied that the work involved came within the ICI sector. The grievance is accordingly dismissed.

36. *Re: File No. 1687-80-M* - This grievance arises out of certain modifications made to a silo and grain elevator on the premises of Kiazer Farms. Kiazer Farms appears to operate as a contractor for local farmers, removing corn from the fields and drying it. We are satisfied that the work was within the ICI sector, and that contrary to the provisions of the collective agreement, one of the respondent's cranes was operated on the project by a non-member of the applicant. The crane was utilized for eight and one-half hours on October 1, 1980, with one-half hour being outside the regular hours of work. This being the case, we direct the respondent to pay to the applicant, in trust for distribution to its members who were unemployed at the relevant time (less any appropriate dues deductions) as well as the appropriate funds, the following amounts:



For wages	\$128.97
vacation pay	12.90
employee health plan	2.55
employee pension plan	5.95
employer labour relations fund	0.42
joint apprenticeship committee	0.17
<b>TOTAL</b>	<b>\$150.96</b>

37. During the hearing, counsel for the applicant sought to question Mr. Wiles concerning job sites, other than those referred to in the grievances, where the respondent's cranes had been utilized. Counsel indicated that although he had no information concerning any possible further violations of the collective agreement, he felt he should be given an opportunity to find out if there had been any. Counsel for the respondent strongly objected to this manner of proceeding. It appeared to the Board that both in the interests of fairness to the respondent, and the need to keep these proceedings within some manageable limits, evidence should be restricted only to job sites referred to in the numerous grievances referred to above, and the Board made a ruling to this effect. The applicant has requested that we reconsider and revise this ruling. However, having reviewed the reasons for making the ruling, we are satisfied that the ruling was in fact the appropriate one to make. The request that the Board reconsider and vary its ruling is accordingly denied.

38. In summary, the Board dismisses the grievances in File No. 0287-80-M, 1178-80-M, 1179-80-M, 1684-80-M, 1685-80-M, and 1686-80-M. With respect to the following files, the Board directs the respondent to pay to the applicant the following amounts:

In File No.	1180-80-M	\$ 403.20
	1181-80-M and	
	1184-80-M	2,424.80
	1183-80-M	811.45
	1185-80-M	990.10
	1687-80-M	150.96
		<b>\$4,780.51</b>

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**1421-80-M Sinclair Welding Limited, Applicant, v. International Union of Operating Engineers, Local 793, Respondent.**

**Section 112a – Whether Board may arbitrate grievances relating to expired collective agreement – Board distinguishing jurisdiction of private arbitration boards and labour board**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**APPEARANCES:** *K. W. Kort and Frank Wiles for the applicant; S. B. D. Wahl, P. Gauthier and G. Steers for the respondent.*

**DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBERS H. J. F. ADE; March 16, 1981**

1. This is a referral of a grievance to the Board pursuant to section 112a of *The Labour Relations Act*. For ease of reference the applicant will henceforth be referred to as “the company” and the respondent as “the union”.

2. The company and the union are both bound by the terms of the current Operating Engineers provincial agreement, which runs from May 1, 1980 to April 30, 1982. The parties were also bound by the terms of the previous provincial agreement which ran from June 19, 1978 to April 30, 1980.

3. The grievance, which is dated May 23, 1980, stipulates that it covers the period of “September 19, 1979 and continuing”, that is for a period of time which spanned the two provincial agreements. Counsel for the union contends that insofar as the grievance purports to relate to the expired collective agreement, the grievance is inarbitrable and not properly before the Board.

4. A similar issue came before the Board in *Genstar Chemical Limited*, [1978] OLRB Rep. Sept. 835. In that case the Minister of Labour referred to the Board the question as to whether he had authority under section 37(4) of the Act to appoint a person to constitute a board of arbitration under an expired collective agreement. The Board concluded that the Minister did have the authority to do so. In reaching this conclusion, the Board reasoned as follows:

7. The Board’s role under section 96(1) is to determine whether the arbitration process is available to the parties. It is clear that in this case the events giving rise to the grievance arose during the term of the collective agreement between the employer and Local 721. The issue is whether the filing of the grievance, after the termination of that collective agreement, restricts the union’s recourse to the arbitration procedure.

8. A fundamental policy of The Labour Relations Act is that all grievances arising during the term of a collective agreement are to be settled without stoppage of work. To ensure the achievement of that policy, the Legislature had mandated in section 37(1) a procedure for the peaceful resolution of all such differences. Section 37(1) requires that:

Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

Here, the Board is dealing with a difference between the parties arising from a collective agreement even though the grievance was filed following the agreement's termination. That being the case, the Statute requires that the arbitration procedure provided for in the collective agreement be available to the parties. The Board does not consider that the legislative policy set out in section 37 was intended to be limited by reference to the time at which the grievance was filed. While the time of filing is a factor which may be taken into account by a board of arbitration - in deciding whether to arbitrate a grievance which is not filed within the time limits specified in the grievance procedure - it cannot preclude the establishment of an arbitration board to deal with a grievance arising during the term of a collective agreement.

9. This fundamental policy of compulsory arbitration of all contract grievances has been recognized by a number of arbitrators. See, for example, *Re International Chemical Workers, Local 564 and Cyanamid of Canada Ltd.*, 20 L.A.C. 111 (Palmer), where the board of arbitration, relying on section 37(1) of the Act, assumed jurisdiction to deal with a grievance after the expiry of the collective agreement in question. Although the grievance in *Cyanamid* had been filed while the agreement was still in effect, that was clearly not the basis for the board's assumption of jurisdiction. In deciding that the grievance was arbitrable, the board in *Cyanamid* explicitly rejected the argument of the employer that its jurisdiction derived from the existence of a collective agreement. In conclusion, the Board stated:

As it is quite possible to have rights determined by arbitration after the agreement which gave rise to those rights ceases to exist where the specific right involved crystallized before the expiry of that agreement...this board is of the opinion that this matter is arbitrable.

See also *Re Truck Crane Ltd. and International Union of Operating Engineers, Local 793*, 4 L.A.C. (2d) 250 (O'Shea) where the board of arbitration decided that it had jurisdiction to deal with a grievance which had been filed after the expiry of the statutory freeze period but before the expiry of the time limits set out in the collective agreement. The board in *Truck Crane* stated:

The right to file a grievance for a breach of the collective agreement which takes place during the eleventh hour of the operation of the collective agreement is not extinguished until after the expiration of any mandatory time limits referred to in the grievance procedure of the collective agreement...



See also *Hartz Mountain Pet Supplies Limited*, March 2, 1978 (Egan), as yet unreported, where the arbitrator assumed jurisdiction, albeit with the consent of the parties, to deal with a grievance in circumstances closely paralleling the circumstances here, and *The City of Kelowna and Canadian Union of Public Employees, Local 338*, November 12, 1975 (unreported), where the British Columbia Labour Relations Board acting under the authority of section 96(1) of the British Columbia Labour Code, (the section which allows it to inquire into collective agreement differences and make orders for their final and conclusive settlement) assumed, over the employer's objection, jurisdiction to deal with a grievance which had not been filed until after the agreement had expired. The Board's ruling was based on its finding that the rights of the union had "crystallized" before the agreement had expired. Although doubt has been expressed on the matter, the Board is unaware of any case in which a board of arbitration has refused jurisdiction to deal with a grievance simply because the collective agreement under which the grievance arose had expired before the date of filing. In *International Nickel*, the case referred to by counsel for the employer, an employee was attempting to bring a claim for entitlement under an existing collective agreement which related to a claim arising under an expired one. In deciding that the employee's claim was not arbitrable, the board quite properly concluded that the claim could only be raised (if at all) under the old agreement and that it could not be decided by a board of arbitration appointed under the new one.

10. Our conclusion is that the policy mandated by section 37 of the Act requires that all grievances which relate to events arising during the term of a collective agreement may be submitted to arbitration, even though the grievance is not filed until after the agreement has expired. In the Board's view, rights which accrue to a party during the life of a collective agreement are in the nature of vested rights which are not automatically extinguished by the termination or expiry of the collective agreement under which they arose. To hold otherwise would be to, in effect, give both employers and unions a licence to violate the terms of collective agreements in the period immediately preceding their expiration.

It should be noted that the Supreme Court of the United States reached a similar conclusion in *Nolde Bros. v. Local 358, Bakery & Confectionery Workers Union* (1977), 94 L.R.R.M. 2753.

5. We adopt the reasoning of the Board in the *Genstar* case, *supra*, and are satisfied that the right of the company to grieve under the expired provincial agreement was not extinguished by the expiry of the agreement.

6. At the hearing, counsel for the union relied on the decision of the board of arbitration in *Re United Steelworkers and International Nickel Co. of Canada Ltd.* 22 L.A.C. 286 (Weatherill). As the Board noted in the *Genstar* case, however, the *International Nickel* case goes no further than to say that a grievance under an expired agreement cannot be decided by a board of arbitration appointed under a new one. The Ontario Labour Relations Board is not established or appointed pursuant to the provisions of any one collective

agreement. Instead, it is a permanent tribunal established by statute with an ongoing authority to determine grievances arising in the construction industry. Accordingly, we see no difficulty in this Board dealing with the grievance insofar as it applies to both the current and expired provincial agreements.

7. The matter is to be re-listed for hearing.
8. The decision of Board Member C. A. Ballentine will be forthcoming at a later date.

**1289-80-U International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Complainant, v. Starplex Scientific Division of Canadian Medical Laboratories Limited, Respondent.**

**Adjournment – Charges – Practice and Procedure – Section 79 – Whether lay-off motivated by anti-union animus – Whether subsequent anti-union conduct relevant – Complainant seeking cross-examination of witness as to charges raised in another complaint – Whether Board granting adjournment to respondent – Whether respondent entitled to re-open examination in chief**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. D. Bell and B. L. Armstrong.

**APPEARANCES:** *Maureen Kenny, Lorna Moses and Craig MacCormack for the complainant; Michael Gordon, Paul Wearing and Kay Starr for the respondent.*

**DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL;**  
March 5, 1981

1. This is a complaint filed under section 79 of *The Labour Relations Act* in respect of alleged violations of sections 3, 56, 58 and 61 of the Act.
2. The essence of the complaint is the complainant's allegation that the respondent committed unfair labour practices by laying off sixteen of its twenty-two production employees on September 15, 1980. The complaint alleges that the employees were laid off in order to prevent them from exercising their rights under the Act, and by example, prevent future employees from exercising their rights under the Act. It further alleges that by laying off the employees, the respondent intentionally interfered with the selection of a trade union and the representation of the employees by a trade union, and that the respondent has refused to continue to employ the employees and discriminated against them because they are members of a trade union, exercising their rights under the Act. The complainant also contends that the respondent sought by those means to intimidate and coerce employees to compel them to refrain from becoming members of the trade union and to refrain from exercising their rights under the Act.
3. The hearing in this matter commenced on October 16, 1980, and continued on

November 25, 26 and 27, 1980; December 1, 2, and 17, 1980; January 6, 1981 and February 5, 1981. On the first day of hearing, counsel for the respondent expressed agreement with counsel for the complainant that the burden of proof lay upon the respondent under section 79(4a) of the Act and called as its first witness Kay Starr, who is President of Starplex Scientific Division of Canadian Medical Laboratories Limited ("Starplex") and the Executive Vice-President of Canadian Medical Laboratories Limited. Counsel completed his examination in chief of Mrs. Starr and counsel for the respondent embarked upon but did not complete her cross-examination of the witness that day.

4. Prior to the continuation of hearing on November 25, 1980, counsel for the complainant, by letter dated November 18, 1980, notified the Board and counsel for the respondent that the complainant intended to allege at the continuation of hearing "the facts, acts and omissions set out in the Section 79 complaint of Craig McCormick [sic] and the union and all employees represented by the union, Board File 1672-80-U". File No. 1672-80-U is a complaint under section 79 filed on November 3, 1980 in which the complainant alleges that the respondent breached sections 3, 56, 58, 61 and 71 of the Act when Mrs. Starr issued the following memorandum dated October 22, 1980 to Craig MacCormack, a machine operator and lead hand employed by the respondent, who was in attendance on behalf of the complainant union at the October 3, 1980 hearing of the complainant's application for certification (before another panel of the Board) and at the October 16, 1980 hearing of this complaint:

"On Wednesday, October 15, 1980, I visited the plant after lunch. The machines were not attended and I found you sitting in the Shipper's Office having a soft drink. I spoke with you and asked you to insure that the machines were not left unattended. You took your soft drink and a book and proceeded to find a chair and sit in the machine area. It was obvious that someone had not been attending the machines for some time in that the cartons were overflowing. Also, the area in and around the machines were littered with plastic boxes. The visitor that I had with me slipped on a vial. It is our responsibility to insure that the area in and around the machines you look after, is clear from debris and safe for working.

Food and drink are not permitted in the plant area and there are 'no smoking' signs in the plant. The Cafeteria has been provided for Coffee Breaks and Lunch Hours. Will you please ensure that the problems outlined above are not repeated.

Thank you."

The complaint alleges that the memorandum contains false and misleading accusations and that it ignores established plant policies and practice with respect to employee breaks and with respect to smoking and consumption of food in the plant. The complaint further alleges that Mrs. Starr has harassed Mr. MacCormack because of the complainant's organization campaign, Mr. MacCormack's participation in the campaign and Mr. MacCormack's participation and anticipated participation at Board hearings.

5. At the continuation of hearing on November 25, 1980, counsel for the complainant explained that she intended to raise the matters concerning the complaint in File No. 1672-80-



U “not as a separate shot at that file, but rather to go to anti-union animus”. Counsel for the respondent argued that the complainant should not be permitted to cross-examine Mrs. Starr with respect to the subject matter of the allegations in that file.

6. After hearing and carefully considering the submissions of the parties, the Board ruled as follows:

“The matters upon which counsel for the complainant seeks to cross-examine are not totally irrelevant to the issues before us in the present case because the existence of anti-union animus during October of 1980 might permit the Board to infer that anti-union animus was also present at the time of the events which form the subject matter of the present complaint. Counsel must be afforded wide latitude during cross-examination.”

Counsel for the respondent then requested that the case be adjourned until the following morning, that the Board grant him leave to converse with Mrs. Starr concerning the matters raised by File No. 1672-80-U notwithstanding the fact that counsel for the complainant had not yet completed her cross-examination of Mrs. Starr and further requested that he be permitted to reopen his examination in chief of Mrs. Starr. After hearing and considering the submissions of counsel concerning those requests, the Board ruled as follows:

“Having regard to all of the circumstances, we are prepared to grant an adjournment until tomorrow morning [November 26, 1980] as requested by counsel for the respondent. We are also, in the rather unique circumstances of this case, prepared to grant leave to counsel for the respondent to converse with Mrs. Starr concerning the allegations contained in File No. 1672-80-U. We are not prepared to permit counsel to reopen his examination in chief of Mrs. Starr. We emphasize to both parties that the present complaint is not being expanded to include the allegations set forth in File No. 1672-80-U; we are merely permitting counsel to cross-examine the witness concerning the subsequent events raised in that file since such subsequent events might be of some evidential value in assisting the Board to determine the respondent’s motivation for the events which form the subject matter of the present complaint. We also note that since the matters pertaining to the second complaint are new matters which arise out of cross-examination, counsel for the respondent will be afforded full scope of re-examination with respect to them, and will also be afforded full scope to adduce reply evidence with respect to such new facts.”

7. Section 91(12) of the Act empowers the Board to determine its own practice and procedure. Moreover, under section 92(2)(c), the Board has power to accept such oral or written evidence as it in its discretion considers proper, whether admissible in court of law or not. (See also section 15(1) of *The Statutory Powers Procedure Act, 1971*.) The principal issue in the present case is whether the lay-off in question was motivated (in whole or in part) by anti-union animus. In cases such as this, the Board is very often required to render a determination based on inferential reasoning as an employer does not normally incriminate himself (see *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299.) Therefore, in assessing the employer’s explanation, the Board must look to all of the circumstances

surrounding the acts in question including the existence of trade union activity, the employer's knowledge of it, unusual or atypical conduct by the employer following upon such knowledge and previous anti-union conduct. A further factor which may be of some relevance in determining this issue in some situations is subsequent anti-union conduct. For example, in *ABC Day Nursery and Kindergarten*, [1980] OLRB Rep. Apr. 391, the Board found that the evidence of the director of the respondent that he acted free from anti-union considerations with respect to two of the first persons to be terminated by the respondent was thrown in serious doubt by the anti-union considerations which the Board found to have been at least part of the motivation for certain other discharges and lay-offs which occurred subsequently. Accordingly, the Board found that the respondent had not met the evidentiary onus placed on it under section 79(4a) with respect to any of the grievors. (See also *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397, in which a finding that subsequent conduct of the respondent constituted a flagrant breach of the duty to bargain in good faith assisted the Board in assessing the *bona fides* of the respondent's earlier conduct which was somewhat ambiguous when considered in isolation.

8. The weight, if any, to be given to evidence of subsequent anti-union conduct will, of course, vary with the circumstances of each case. However, this is a matter to be assessed by the Board having regard to all of the evidence in a particular case. For the foregoing reasons, the Board hereby affirms its ruling of November 25, 1980 as set forth above.

9. The respondent manufactures, sells and distributes various types of disposable health care products including specimen collection systems. Since its inception in 1977, the respondent's production has increased substantially as a result of developing new products and acquiring a larger share of the market. In August of 1979, the respondent retained Price Waterhouse Associates as management consultants to study its manufacturing activities, organization and systems. The consultants prepared and submitted in December of that year a report containing recommendations designed to improve the respondent's control over its manufacturing operations. As a result of the report, the respondent implemented a new inventory control system, made some changes in job descriptions and improved its financial reporting and production scheduling.

10. The respondent has also attempted to increase its productivity through automation. Early in 1980 the respondent retained Edward Tischlinger as a consultant concerning production and personnel. Mr. Tischlinger, who is President of a pharmaceutical company located in Orillia (Intra-Medical Pharmaceuticals Ltd.), has a master's degree in engineering and has many years of experience with respect to production of health care products. After conducting time studies, assessing production and examining all of the respondent's equipment, he submitted a written "evaluation on manufacturing and a step by step priority to cure the problems". Included in that report were a substantial number of specific recommendations including sale of certain equipment, rebuilding of other equipment, automation of certain production and modification of the lay-out of the plant. A number of those recommendations were implemented during the spring and summer of 1980 at a cost in excess of \$100,000, although some items had not yet been fully implemented at the time of the lay-off.

11. After receiving that report, the respondent arranged for Mr. Tischlinger to continue as its consultant. He also acted as part-time plant manager at the Starplex plant from the spring of 1980 until a new full-time plant manager was hired in November of 1980. The amount of time which Mr. Tischlinger spent at the Starplex plant was variable but averaged

two or three days per week. In her testimony before the Board, Mrs. Starr described Mr. Tischlinger's duties and responsibilities as follows:

"Mr. Teschlinger was really a consultant. He couldn't hire and fire without permission from Dr. Mull [the Vice-President of Starplex and President of Canadian Medical Laboratories Limited] and I. He made recommendations to us. It was his responsibility to keep production going. He was not involved in administration, finance or personnel."

12. Mrs. Starr testified that "around the end of August" she made a decision, after "an awful lot of discussion" with Dr. Mull who agreed "rather reluctantly", to lay-off employees at the Starplex plant. It was her evidence that in late August of 1980 she received a set of financial statements for Starplex for the month of July which indicated that "labour costs were out of whack". As a result, she instructed Mr. Tischlinger to prepare costings on "a couple of products" which were of particular interest to her. (Neither the financial statements nor the costings were produced as exhibits.) She also visited the plant on several occasions and observed "a lot of people that were not busy". She further testified:

"We had all this equipment which had arrived. We had farmed out the small run products to ARC Industries. Many of these people had skills which would only permit them to use their hands. They couldn't be trained for anything else because of limited education and there was nothing to train them for. It was costing us a lot of money to have people stand around. We could not afford it."

It was her evidence that she and Dr. Mull met with Mr. Teschlinger near the end of August, at which time Mr. Teschlinger stated that he had also concluded that lay-offs were necessary and was waiting for their approval.

13. Mrs. Starr told the Board that although the decision to lay-off employees was made at the end of August, it was not implemented until September 15, 1980 due to the failure of Mr. Tischlinger to carry out the instructions which she gave him at the end of August to "handle the lay-off as quickly as possible". It was her evidence that she, Dr. Mull and Mr. Tischlinger discussed the lay-offs at lunch on Tuesday, September 9, 1980:

"We discussed lay-offs on that day. I was not very happy with the fact that the decision had not been implemented. Mr. Tischlinger told me that he hadn't had time to have a piece of paper typed. I said: 'Fine. I'll type the paper and get the job done.' I instructed him that he had to handle the lay-offs and that he had to handle them that week."

14. Mrs. Starr testified that she transmitted the following memorandum to Mr. Teschlinger on the following day:

"

#### MEMORANDUM

To: Ed Tischlinger [sic]  
cc: J. D. Mull

FROM: K. Starr  
DATE: September 10, 1980

The attached has been written for you so that now there can be no



excuses. While I appreciate that this is a painful job there can be no further procrastination and the notices must be implemented tomorrow as agreed. yesterday. [sic]

If you have any questions please call me.

Thank you,

K. Starr

Attached to that memorandum was the following notice dated September 10, 1980:

*“NOTICE TO ALL EMPLOYEES — STARPLEX*

As many of you are aware in that many of you have commented on the fact that there is not enough work for you people to do. [sic] Our business has changed in that automation has taken over a number of the tedious manual tasks. The small volume of products that we have manufactured are no longer feasible for us to manufacture.

The task to revamp the plant and discontinue certain products is now at the point where it is necessary for us to provide lay-off notices.

Our employees will receive one week's pay regardless of whether or not they have been with the company for three months now in lieu of time.

Hopefully with the changes we will be in a position to call back many of you on a seniority and skill basis.

E. Tischlinger  
Acting Plant Manager”

Mrs. Starr further testified that she did not find out until 5:00 p.m. on Thursday, September 11th that the notice of lay-offs had not been given to the employees that day. She stated that Dr. Mull advised her that notice had not been given because Mr. Tischlinger did not come down from Orillia as he was supposed to do. However, he promised that Mr. Tischlinger would be there on the following day (Friday, September 12th) to do it.

15. Mrs. Starr's evidence concerning the material events on September 12th and 15th was as follows:

“I followed up on that. On Friday the 12th I wanted to find out whether the notices had been given. Mr. Tischlinger hadn't arrived. I phoned him in Orillia and said: 'Get your behind down here and get those notices implemented or I'll do it myself.' He said 'I'll do it the first thing Monday morning.' I said 'OK'. I told him that he wasn't going to get any more money until it was done. I had a cheque on my desk drawn to his credit. I didn't talk to Mr. Tischlinger about this again until Monday. I came to work on Monday morning around 9:00 a.m. at 4500 Dixie Road. During

the morning I had a meeting scheduled and had people in my office all morning. I didn't talk to Mr. Tischlinger on Monday morning. I got a message when I came back from lunch from Mr. Tischlinger. I left for lunch a little after 12:00 . . . I was in a meeting (which included lunch) and said (to my secretary) that I was not to be disturbed . . . I got back at 2:00 p.m. A telephone message taken by my secretary indicated that the lay-offs had been implemented . . . When I came back from lunch I also found the envelope for the Ontario Labour Relations Board [containing notice of the complainant's application for certification and related documents]."

Mrs. Starr told the Board that she then called counsel and attended at his office with the documents from the Board. Upon being advised of the events which had occurred, counsel telephoned the Registrar of the Board and conveyed to him the information contained in the following letter which was dictated by counsel in the presence of Mrs. Starr and hand delivered to the Registrar later that afternoon:

"Dear Mr. Aynsley:

Re: Starplex Scientific Division of Canadian Medical Laboratories Limited and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America. O.L.R.B. File No. 1194-80-R.

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We act for the Respondent Starplex Scientific, Division of Canadian Medical Laboratories Limited and wish to confirm with you the thrust of the telephone advice given to you at 3:30 p.m. on Monday, September 15th, 1980.

Approximately three months ago my client undertook an extensive program to automate and change the physical lay-out of its plant located at 1810 Meyerside Drive in Mississauga, Ontario. At the same time the decision was made that a substantial percentage of the working force in the plant would be laid off when the automation program and rearrangement of plant facilities had been completed.

On Friday, the 12th day of September, 1980 the automation program and rearrangement to facilities program was completed.

On or about Tuesday, the 9th day of September, 1980 senior officials of the Company met to discuss the completion of the program and the impending lay-off of employees. At that meeting it was decided that employees would be given notice of lay-off on Friday September 12th, 1980 and that the advice to employees would be implemented by the acting Plant Manager, Ed Tischlinger.

Mr. Tischlinger, who lives in Orillia, Ontario and who is in charge of another business venture in that municipality was not able to be in Mississauga for the purpose of implementing the lay-off as aforesaid.

Accordingly the implementation of the lay-off in question was delayed until Monday, September 15th, 1980.,

Accordingly notice of lay-off was given to the employees of the Company at about the hour of 11:00 a.m. on Monday, September 15th, 1980 by the Foreman of the employees in question (Pete Morley) upon the instructions of Mr. Tischlinger.

Sometime on Monday, September 15th, 1980 Quick Messenger Service Canada Limited attempted to serve documents from the Ontario Labour Relations Board upon my client at 1810 Meyerside Drive in Malton, Ontario.

Sometime on September 15th, 1980 the said documents were delivered to the executive offices of my client Company located at 4500 Dixie Road in Mississauga, Ontario and directed to the attention of the Executive Vice-President of the Company, Mrs. Starr. A photostatic copy of the front of that envelope is enclosed for your convenience. In that connection I would draw to your attention that the plant of Starplex Scientific is located at 1810 Meyerside Drive in Mississauga, Ontario.

In any event someone apparently signed the Quick Messenger Service invoice number T410400 on behalf of the Company. I am instructed that the signature in question is not recognized as being the signature of anyone in the employ of the Company. A photostatic copy of the Quick Messenger Service invoice is enclosed for your convenience. The document in question was brought to the attention of Mrs. Starr at about the hour of 2:00 p.m. on Monday, September 15th, 1980. Mrs. Starr immediately contacted counsel and arrived in our offices at about the hour of 3:15 p.m.

As soon as we became aware of the circumstances pertaining to the lay-off in this matter and in view of the application for certification we immediately telephoned you to apprise you of the circumstances herein.

I should tell you that Mrs. Starr has not as of this writing posted the notice to employees (Form 5) because of her concern to cut through traffic and get to counsel's office expeditiously.

I have advised her that she must immediately return to the plant and post the documents in question and return the Form 47, Return of Posting card, to you.

In the circumstances I am drawing this situation to the immediate attention of the Board and would request that this letter be made a part of the record in this proceeding.

The reply to application for certification will be filed in due course and in accordance with the Board's rules."



Mrs. Starr told the Board that there was nothing in that letter which to her knowledge was incorrect. She also testified that she was unaware of any union organizational activities concerning the employees of Starplex until she received the Board documents relating to the complainant's application for certification. She denied that the respondent had at any time discriminated against employees because they were members of a trade union and specifically denied that the respondent intended to interfere with the complainant trade union by the impugned lay-offs. She further advised the Board that laying off the sixteen employees saved the respondent \$560 per day.

16. Mrs. Starr testified that in her capacity as Executive Vice-President of Canadian Medical Laboratories Limited (of which Starplex is a division) she has dealt with the Ontario Public Service Employees Union in two bargaining units (one in Hamilton and the other in Simcoe) for over three years. She characterized her relationship with that trade union as being "very, very amicable".

17. Although Mrs. Starr indicated in her examination in chief that she did not care whether the employees of the respondent were members of a trade union or not, she reacted quite emotionally and evasively during cross-examination when shown a copy of a book entitled "Making Unions Unnecessary", initially she merely acknowledged that she "might have seen it" but under further cross-examination she conceded that she had read it and that it was one of the books in her personal library. As suggested by the title, the subject matter of that book (which was entered as an exhibit) is "concepts and strategic approaches leading to the attainment of the 'goal': no unions". It emphasizes what it describes to be the "positive approach" of "closing the gap between management and labour" by improving communications, permitting employees to participate in job and systems design, and tailoring job opportunity and remuneration to accommodate disparate employee value systems so as to "make it unnecessary for employees to look to a union for the things they aren't getting from management". During cross-examination, Mrs. Starr was asked if she recalled giving a copy of the book to Mr. Werk (the former manager of the Starplex plant), to which she replied: "No, I did not give him that book." However, during re-examination when asked by counsel for the respondent if she had caused the book to be sent to Mr. Werk, she replied:

"I caused distribution of the book. Mr. Werk probably would have received a copy. It would have gone to managers and supervisors. We have an educational program. This was one of the books. But that book would not have been sent to all employees. It would have been too expensive..."

The respondent entered as exhibits in excess of twenty pamphlets and booklets (concerning a variety of topics including employee loyalty, job simplification, the importance of company profits, human rights, workman's compensation, driving safety, telephone manners, Canada Pension Plan and employment standards). Mrs. Starr testified that those were the "kinds of things distributed to all employees" as part of the respondent's educational program. However, the evidence of employees of the respondent who testified before the Board and the evidence of foreman Peter Morey indicates that distribution of such materials to employees was far more limited than Mrs. Starr suggested in her testimony. Moreover, the other materials allegedly distributed to employees are substantially different from the book in question which was distributed only to members of management. Mrs. Starr's demeanour and evasiveness during cross-examination concerning the book lead the Board to conclude that

her statement in examination in chief that she did not care whether employees were members of a trade union or not, was lacking in candour. Her lack of candour concerning that matter together with the substantial conflicts between her evidence and the evidence of other management witnesses set forth below leads us to conclude that little weight can be given to much of her evidence.

18. Mr. Tischlinger also testified on behalf of the respondent. It was his evidence that he had suggested that the plant be totally closed down for four weeks but that this was “out of the question due to orders” so he suggested that the work force be reduced instead. (Foreman Peter Morey, who was called as a witness by the complainant and who impressed the Board as a very candid and credible witness, confirmed that Mr. Tischlinger had said in July or August of 1980 that if he had his way, he would have a plant shutdown until all of the modifications to the plant were completed, but that Dr. Mull did not agree with him about shutting it down.) Accordingly, Mr. Tischlinger hand printed and sent the following memo to Dr. Mull on August 28, 1980:

“Need your permission to lay-off people, except for skeleton crew to complete renovation and repair equipment, and rework moulds. Lay-off would be for 3-4 weeks depending on equipment repair and time study of assemblies.

(signed)

Ed T.”

He informed the Board that Mr. Morey and Mr. MacCormack had suggested to him that employees should be laid off because many of them were “just standing around unoccupied”. (In his evidence, Mr. Morey confirmed that he had suggested to Mr. Tischlinger in August that the respondent “had too many machine operators” and “could afford to lay-off a couple”). Mr. Tischlinger testified that although he received permission to implement the lay-offs on September 9, 1980 at the aforementioned luncheon meeting and was told at that time that he was to implement the lay-offs immediately, he “just didn’t follow through due to pressing personal circumstances” concerning his own business and customers and “just didn’t get around to it” until September 15, 1980, despite his meeting with Dr. Mull and Mrs. Starr on September 9, 1980 and the memo dated September 10, 1980 (set forth above) from Mrs. Starr. Contrary to Mrs. Starr’s evidence that the employees would not be recalled due to their lack of education which, in her view, would preclude them from being restrained to operate the new equipment, Mr. Tischlinger testified that “the people who were laid off are supposed to be called back”. In response to a question concerning the timing of the recalls, he testified (on November 27, 1980):

“It’s hard to say. It depends on when the specialized equipment arrives. It could be February or March [of 1981]. Delivery time is three to six months”.

19. Mr. Tischlinger testified that he arrived at the plant about 9:00 a.m. on September 15th. He stated that he was supposed to meet with Dr. Mull about the lay-offs but was unable to do so when Dr. Mull arrived at 9:15 a.m. because he (Mr. Tischlinger) was busy in the plant attempting to repair an injection moulding machine which had broken down. It was his evidence that Dr. Mull left him to work along with Mr. Morey and Mr. MacCormack in an attempt to repair that machine which produced one of the components of the respondent’s

main product, the B900 speciman container. He further testified that the meeting was postponed until Dr. Mull returned at approximately 10:30 a.m. at which time Mr. Tischlinger, in the presence of Dr. Mull, went over a list of the Starplex employees with Mr. Morey to decide how many employees would be laid off and which employees would be retained in order to maintain production, having regard to their length of service and ability. He then asked Mr. Morey to inform the affected employees of the lay-offs.

20. It was Mr. Tischlinger's evidence that he was not aware at the time of that meeting that the complainant union had applied for certification. He told the Board that he did not become aware of the certification application until the afternoon of September 15th:

"I learned about the application for certification between 1:00 and 1:30 that afternoon when a Mrs. Moses [a representative of the complainant union] called. She asked me if I was aware that there was a union trying to organize the shop. I said: 'No'. I told her that I was the wrong one to talk to as I was just a consultant and didn't get involved in the administration of the company."

Mr. Tischlinger also told the Board that he had been a member of the United Steelworkers Union and had been a union steward for two years in the 1950's.

21. Dr. Mull testified that he had been hoping that it would not be necessary to lay-off any employees and, accordingly, had not given Mr. Tischlinger any permission to lay off employees prior to September 9, 1980. He confirmed that Mr. Tischlinger was told at the September 9th luncheon meeting to proceed immediately to make the lay-offs which he (Mr. Tischlinger) felt to be necessary but that Mr. Tischlinger failed to do so. He further confirmed that Mr. Tischlinger's delay in implementing the lay-offs due to other commitments was a source of great dissatisfaction to himself and Mrs. Starr. His evidence concerning the events which occurred on September 15th prior to the lay-offs parallels Mr. Tischlinger's:

"I attended at the plant on Monday morning September 15th. I walked in at 9:15 and looked first for [Mr. Tischlinger]. He was up to his elbows with machine problems on our number one Engel. He was working with Pete [Morey] and Ed MacCormack. I said to him: 'When are you going to be free?' He said: 'About half an hour.' I turned around. The front office was all upside down as the carpenters were in there tearing walls out. I went down the street to a restaurant for a coffee and read my paper. Then I came back at 10:15 and went to Ed [Tischlinger] and said: 'Let's get this over.' He was free. He called Pete Morey into the office and the two of them sat at a desk. The two of them went over a list of [employees]. I stood at one side just making sure it was done. They went over the list and decided who should be let go. They were doing it on seniority."

It was Dr. Mull's evidence that the respondent hopes to recall some of the employees to train them on the new machines as they become operational.

22. Craig MacCormack contacted Mrs. Moses during the summer of 1980 "to find out about forming a union". After discussing the situation, they decided to "wait until after the



holidays to start the drive". During the first two weeks of September, employees signed membership cards provided by Mrs. Moses. Mr. MacCormack served as the collector on more than half of the cards. He testified that the cards were signed confidentially and that to the best of his knowledge there had been no breach of that confidentiality. That the respondent had no knowledge of any union organizational activities prior to September 15, 1980 was confirmed by the evidence of Mr. Morey; the fact that Mr. Morey, who enjoyed a close working relationship with the employees in the plant, was unaware of any such activities makes it highly unlikely that any other member of management such as Mr. Tischlinger, Mrs. Starr or Dr. Mull, whose contact with the employees was much less frequent and intimate than Mr. Morey's, was aware of any organizational activities prior to receipt of the documents from the Board on September 15th.

23. On Friday September 12th, Mr. MacCormack worked at the Starplex plant from 4:00 p.m. to midnight. Shortly after 7:00 p.m. he left the production area of the plant and entered the office to check the front door to make sure that it was locked. (It had been Mr. MacCormack's practice to check the door each evening when he was working on the afternoon shift since the time when Dr. Mull had found the door unlocked on a summer evening during a shift of which Mr. MacCormack was "in charge" as lead hand.) Upon hearing a knock he opened the door and received an Ontario Labour Relations Board envelope from a courier. The envelope was addressed to "Starplex Scientific Division of Canadian Medical Laboratories Ltd., 1810 Meyerside Drive, MALTON, Ontario, L5T 1B4". After signing a receipt for it, Mr. MacCormack placed the envelope on secretary-receptionist Lynda Wessell's desk.

24. The plant did not operate on September 13th or September 14th. On Monday September 15th, Mr. Morey arrived at work at 7:30 a.m. He was in the office at 9:00 a.m. when Mrs. Wessell began going through the mail at her desk. When she came upon the envelope from the Board, she asked Mr. Morey what it was. He said that he did not know and suggested that she open it. (The respondent's mail opening procedure is that if a piece of mail is merely addressed to the company, Mrs. Wessell opens it unless it is marked "Personal and Confidential"; if a piece of mail is addressed to a specific person, Mrs. Wessell forwards it unopened to that person.) Mrs. Wessell proceeded to open the envelope and glanced at its contents but still did not know what it was. Accordingly, she handed it to Mr. Morey who "read the top of it" and said: "Well it's got something to do with a union. I'd better give it to Ed [Tischlinger] when he comes in." Mr. Morey's evidence concerning the events which followed was:

"Just as I said that I believe Ed just came in the door. I asked if I could see him. He said: 'Yes'. We went into the office and I gave it [the contents of the envelope] to him. It wasn't in the envelope when I gave it to him. I left the envelope [Exhibit #5] on [Lynda Wessell's] desk when I gave it to him. I told him that I didn't know what it was. I said, 'It's got some union form', and just handed it to him. He very quickly briefed through it-just the first couple of pages. He said he'd better leave it for Dr. Mull to see. He placed it on the corner of the desk. Nothing further was said. I left the office. I went back to the plant."

During cross-examination Mr. Morey indicated that Mr. Tischlinger had looked at those documents for approximately twenty seconds. Mr. Morey also testified that upon returning to

the production area, he (Mr. Morey) "mentioned to a couple of people that [the company] had just got something to do with a union" but said that he was not certain what it was all about. Mr. MacCormack was apparently one of those to whom he spoke. He also said to the shipper and Mr. MacCormack: "I wouldn't be surprised if there is a big lay-off now or if they [the respondent] shut the whole plant down." Under cross-examination, Mr. Morey acknowledged that he had no authority to make a statement of that nature. He further acknowledged that no one from the management of the respondent had ever told him that if a union came in, employees would be laid off or the plant would be shut down. His only explanation for making that statement was: "I didn't know what was going to happen. That was the first thing that came into my mind. I've never had experience with a union before . . . I guess I was kind of shocked about the union part too."

25. Between 10:00 and 10:30 that morning, Mr. Tischlinger called Mr. Morey into his office. Dr. Mull was already in the office at that time. Mr. Tischlinger explained to Mr. Morey that the respondent was going to "lay-off anybody that they didn't really need" because "with all the work going on, everybody's in everybody's way" and because "there was a slight shortage of work". Mr. Tischlinger and Mr. Morey then reviewed a list of the employees: Mr. Morey told Mr. Tischlinger that the best female workers were the ones who had been employed by the respondent the longest. Mr. Morey also suggested that Mr. MacCormack be retained rather than another machine operator with longer service because Mr. MacCormack was more knowledgeable and reliable. Thus, four female production employees, Mr. Morey and Mr. MacCormack were selected to continue working and all the other production employees were notified by Mr. Morey shortly after noon that they were laid off "for about two to three weeks". One of the employees included in the lay-off was lead hand Tom Ikeno. At approximately 2:30 that afternoon, Mr. Morey telephoned Mr. Ikeno, who was scheduled to commence work at 4:00 p.m., and told him that he would not have to come to work because the afternoon shift had been laid off. Mr. Morey advised him that he (Mr. Morey) had told Mr. Tischlinger that he thought that Mr. Ikeno's lay-off was a mistake but that it had "gone through anyway". Dr. Mull telephoned Mr. Ikeno at approximately 6:00 p.m. and told him that he had been laid off by mistake and that he wanted him to return to work Tuesday, September 16th on the day shift. Shipper Vishnu Baldosingh was also subsequently recalled. Mr. Morey's testimony concerning the recall of Mr. Baldosingh was as follows:

"A while after [the recall of Mr. Ikeno] I suggested to Ed [Tischlinger] that he call the shipper back because we really needed a shipper. He said: 'Yes. I didn't really intend to lay the shipper off either.'"

26. During cross-examination Mr. Morey stated that on the basis of what he had seen in the plant up to September 15th, laying off employees seemed like a reasonable thing to do. In re-examination he explained his earlier response in the following words: "At the time [September 15] it would have been reasonable for ten to twelve, say ten people to be laid off, giving us a few more hands . . . At the time it wouldn't have hurt us."

27. Mrs. Wessell was also called as a witness by the complainant. She confirmed that after she opened the envelope from the Board on September 15th in the presence of Mr. Morey, he took the contents into the office which was being used by Mr. Tischlinger. She identified Exhibit #5 as the envelope in question but stated that "the line going through the address" and the words "MRS. STARR 4500 DIXIE RD, MISS." hand printed in the upper



left corner of the front of the envelope were not on it at the time she removed the documents from it. It was her evidence that she threw the envelope into the garbage where, to the best of her knowledge, it remained when she left work at 5:00 p.m. that day. She was unable to identify whose hand printing was on the envelope. (She stated that she was familiar with the penmanship of Dr. Mull and Mrs. Starr since she had worked for them at 4500 Dixie Road for six months before her transfer to the Meyerside Drive plant.)

28. Mrs. Wessell testified that about fifteen minutes after Mr. Morey brought the documents into Mr. Tischlinger's office, Dr. Mull came up to the office to speak to Mr. Tischlinger. It was her evidence that Dr. Mull was in the office with Mr. Tischlinger and the respondent's salesman for "about ten or fifteen minutes"; when he came out of the office "he seemed a little upset" and said to the salesman: "Cancel the meeting. I haven't got time." In his testimony, Dr. Mull denied that he was upset. It was his evidence that he told the salesman to cancel the meeting which had been scheduled for that morning with one of the respondent's distributors because he (Dr. Mull) had forgotten to obtain notarization of the certificate of continuing guarantee which the distributor wanted. It was Dr. Mull's evidence that he "had cancelled about eight times before".

29. The complainant called as an expert witness an experienced forensic consultant who expressed the opinion that the person who hand printed the words "MRS. STARR . . . MISS." on the board envelope (Exhibit #5) was the same person who had printed the memo (quoted earlier in this decision) dated August 28, 1980 from Mr. Tischlinger to Dr. Mull. Counsel for the respondent asked the Board for a ruling as to whether it would be open to counsel for the complainant to argue on the basis of that evidence that Mr. Tischlinger was the author of the words hand printed on the envelope and to comment adversely upon Mr. Tischlinger's credibility on the basis thereof. It was his submission that counsel should not be permitted to do so because she had not during her cross-examination of Mr. Tischlinger asked him anything about the envelope or whether he had hand printed any words on it. After hearing and considering the submissions of the parties concerning that matter, the Board ruled as follows on January 6, 1981:

"The Board will permit counsel for the complainant to rely upon the expert evidence adduced this morning and to comment upon Mr. Tischlinger's evidence concerning his knowledge of the application for certification in light of that expert testimony. However, we are also of the view that principles of fairness and natural justice require that the respondent, which proceeded first with its case, be afforded an opportunity to adduce reply evidence concerning this matter. In the circumstances of this case, and particularly in view of the failure by counsel for the complainant to cross-examine Mr. Tischlinger concerning the envelope and the printing contained thereon, the Board will exercise its discretion to grant an adjournment to the respondent to give it an opportunity to recall Mr. Tischlinger (who is presently in Florida on business) with respect to the printing on the envelope and also to adduce expert evidence concerning that printing if it chooses to do so after having an opportunity to consult with such an expert. However, any other reply evidence which the respondent wishes to adduce must be adduced today."

30. At the continuation of hearing on February 5, 1981, Mr. Tischlinger testified that it



was not his hand printing which appeared on the envelope. He further stated that he did not know whose hand printing it was. Counsel for the complainant chose not to cross-examine him with respect to that evidence. The respondent also called as an expert witness an experienced examiner of questioned documents who expressed the opinion that the envelope and the memo were hand printed by two different people.

31. During November the respondent used a number of temporary employees to perform certain work in the plant. Four temporary employees worked for one day on a "B900 loose cap order"; after checking the B900 vials for cracks, they put the caps on loosely. One of the temporary employees worked at the plant for several days on that order. He also "broke down" some boxes and helped the shipper. Mr. MacCormack testified that any of the employees who were laid off could have done the loose cap order work. This evidence was not refuted by the respondent nor was Mr. MacCormack's evidence that some of the employees who were laid off were "a lot faster" than the temporary employees at checking and capping vials.

32. It appears from the evidence that some of the grievors have been recalled. However, the Board was not provided with the recall details in view of the agreement of the parties that in the event that a violation of the Act was found to have occurred, the Board would remain seized to resolve any issues concerning quantum of compensation which the parties were unable to resolve through agreement.

33. Section 79(4a) of the Act provides:

" On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act of employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization."

Certain of the alleged violations of the Act in this matter cast upon the respondent the burden of proving that it did not act contrary to the Act, namely, the alleged violations of sections 58 and 61 of the Act; section 79(4a) does not apply to the other alleged violations of the Act (see *Craftline Industries Limited*, [1977] OLRB Rep. Apr. 246). Accordingly, the Board will apply the "reverse onus" only to those allegations to which section 79(4a) has application.

34. In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

"...the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred".

Similar considerations are applicable to lay-offs. In *Tillotson-Sekisui Plastics Limited*, [1979] OLRB Rep. Oct. 1027, a case involving a complaint in respect of the lay-off of twenty-three employees, the Board stated (at paragraph 11):

“ This matter falls within the ambit of section 79(4a) which places the burden of proof in a complaint such as this upon the employer. The Board referred to the nature of the onus which falls to the respondent in these matters in the *Pop Shoppe (Toronto) Limited* case [1976] OLRB Rep. June 299, wherein at paragraph 4 the Board stated:

‘Section 79(4a) of *The Labour Relations Act* places the legal burden upon the employer in complaints such as the one before us, to satisfy the Board, on the balance of probabilities, that it has not violated the Act. In order for the Board to find that there has been no violation of the Act it must be satisfied that the employer’s actions were not in any way motivated by anti union sentiment; the employer’s actions must be devoid of ‘anti-union animus’. (See the *Bushnell* case (1974), 4 O.R. (2d) 332.) The employer cannot engage in anti union activity under the guise of just cause or under the guise of business reasons. Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti-union motive and which the evidence establishes to be the only reason for its conduct. (See *Barrie Examiner* [1975] OLRB Rep. Oct. of 745 and *The Corporation of the City of London* [1976] OLRB Rep. Jan. 99.)’ ”

(See also *Knud Simonsen Industries Limited*, [1980] OLRB Rep. Oct. 1466, and *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645.)

35. It was submitted on behalf of the respondent that the impugned lay-offs could not have been motivated by anti-union animus because management was unaware of the complainant’s application for certification at the time the employees were laid off. However, having regard to all of the evidence before us, we are not satisfied that the Board documents had not come to the attention of management by the time of the lay-off. Accepting as we do the highly credible evidence of Mr. Morey that he handed the Board documents to Mr. Tischlinger and, in doing so, referred to them as a “union form”, at which point Mr. Tischlinger looked through the documents for approximately twenty seconds before placing them on the corner of his desk and saying that he had better leave them for Dr. Mull to see, and having regard to the relative credibility of the witnesses who testified before us, we are unable to give credence to the testimony of Mr. Tischlinger and Dr. Mull that those documents were not brought to Dr. Mull’s attention prior to the time of the lay-offs on September 15th. Mrs. Wessell’s credible testimony that Dr. Mull appeared to be upset when he left Mr. Tischlinger’s office after ten or fifteen minutes supports the inference that Mr. Tischlinger brought the documents to Dr. Mull’s attention as Mr. Tischlinger told Mr. Morey he would and as would be quite natural for the consultant and acting plant manager to do under the circumstances. Moreover, even if we were to disregard Mrs. Wessell’s evidence on this point and accept the evidence of Dr. Mull and Mr. Tischlinger that their first encounter on the morning of September 15th occurred while Mr. Tischlinger was too busy attempting to repair a machine to meet with Dr. Mull at the time, the evidence clearly indicates that Dr. Mull was already in Mr. Tischlinger’s office when Mr. Morey was summoned to the office to assist in selecting

employees to be laid off. Having regard to all of the circumstances including Dr. Mull's demeanour while testifying concerning the events of September 15th, we do not believe that Dr. Mull was unaware of the Board documents when Mr. Morey came to Mr. Tischlinger's office between 10:00 and 10:30 that morning.

36. Although we are not satisfied on the evidence before us that Mr. Tischlinger was the person who struck out the Meyerside plant address on the Board envelope and printed Mrs. Starr's name and office address on it, we are left without explanation with respect to how the documents came to be removed from Mr. Tischlinger's desk, the envelope came to be removed from Mrs. Wessell's waste basket, and the documents and envelope came to be delivered to Mrs. Starr's office at or before 2:00 p.m. that day. This substantial gap in the respondent's case serves to emphasize the unsatisfactory nature of its evidence concerning management's awareness and treatment of the Board's document's on the morning of the lay-offs.

37. There are also other circumstances which support the Board's conclusion that the respondent has not established on the balance of probabilities that no anti-union animus existed in the mind of the respondent at the time of the lay-offs. The evidence of the respondent's witnesses was in conflict concerning when the decision to lay-off employees was actually made; Mrs. Starr testified that the decision was made at the end of August but Dr. Mull and Mr. Tischlinger testified that it was not made until September 9th. There was also conflict of their evidence concerning the reasons for and probable duration of the lay-off. Mrs. Starr indicated that the reasons were excessive labour costs and employee redundancy due to automation of the plant. She intimated that the lay-offs would be permanent since many of the employees could not be trained for anything other than manual operations because of their limited education. Mr. Tischlinger, on the other hand, testified that the purpose of the lay-off was to permit the plant renovations to be completed, equipment to be repaired and moulds to be reworked. It was his understanding that the lay-off would last for only two or three weeks. Dr. Mull also saw the lay-off as a relatively short term measure which would be concluded by recalling employees to train them on the new machines as they became operational.

38. The Board is satisfied that some of the grievors would have been laid off on September 15th regardless of whether the respondent had received notice of application for certification that morning. This conclusion is supported by Mr. Tischlinger's memo dated August 28th to Dr. Mull and by the evidence that a decision to lay-off some employees was made by management at the luncheon meeting on September 9th. However, having regard to all of the evidence before us, we find that the respondent was motivated at least in part by anti-union sentiment to lay-off more employees than it would have laid off if it had not received the Board documents that day. Although the memo of August 28th refers to maintaining a "skeleton crew", the witnesses called by the respondent conceded that there had been no discussion prior to September 15th of the actual number of employees to be laid off. During cross-examination concerning her late August discussion of potential lay-offs at the Starplex plant, Mrs. Starr stated that the subject "wasn't a significant matter; it was just one of a number of things". This statement lends some support to the contention by counsel for the complainant that although some lay-offs may have been contemplated prior to the time at which the respondent became aware of the application for certification, the respondent did not plan such an extensive lay-off involving as it did over two-thirds of the production workers at the plant. The attempt by management witnesses to justify the lay-off by referring to Mr. Morey's statement that there were too many employees also supports our conclusion that a smaller lay-off was contemplated; as indicated above, Mr. Morey had merely suggested during



the summer of 1980 that the respondent could afford to lay-off “a couple” of machine operators. It is also evident from the testimony of Mr. Morey that the number of employees laid off on September 15th was greater than could be justified by *bona fide* business considerations. As indicated above, he testified that it would have been reasonable for the respondent to lay-off ten or twelve employees on September 15th, not sixteen. The “mistaken” lay-off of Mr. Ikeno provides further support for our finding that an unjustifiably large number of employees were laid off that morning, as does the subsequent recall of the shipper whom Mr. Tischlinger also “didn’t really intend to lay-off.”

39. Having regard to all of the evidence before us, and having particular regard to the highly credible evidence of Mr. Morey, the Board finds that at most twelve of the sixteen grievors would have been laid off on September 15, 1980 if the respondent had not received notice of the complainant’s application for certification that day. Accordingly, the Board finds that the respondent breached sections 58 and 61 of the Act by laying off four of the sixteen grievors that day. In the circumstances of this case, it is necessary for the Board to make any findings with respect to Mrs. Starr’s motivation for forwarding the memo dated October 22, 1980 to Mr. MacCormack (which action forms the subject matter of the complaint in File No. 1617-80-U) and, accordingly, the Board declines to do so.

40. The Board therefore orders:

- (i) that each of the four grievors with the longest respective periods of service with the respondent be reinstated in active employment by the respondent forthwith;
- (ii) that the said four grievors be fully compensated by the respondent for all lost wages and benefits sustained by them between September 14, 1980 and their respective dates of reinstatement in active employment;
- (iii) that the respondent pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note. 13 dated September 8, 1980; and
- (iv) that the respondent post copies of the attached notice marked “Appendix”, after being duly signed by the respondent’s representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.

41. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board’s order.

## DECISION OF BOARD MEMBER B. L. ARMSTRONG;

1. I dissent.

2. While I am in agreement with the majority's basic characterization of most of the facts of this case, I find it impossible to accept the approach taken with regard to remedy.

3. The so-called "reverse onus" as set out in section 79(4a) of *The Labour Relations Act* places an extremely heavy evidentiary burden on the employer. This burden is justified by sound labour relations policy considerations. As the Board stated in the case of *Modern Pattern Works Ltd.*, [1976] OLRB Rep. Feb. 67:

"The reverse onus acknowledges that the reasons for the employer's action lie peculiarly within its knowledge."

In the case of *I. C. B. Warehousing*, [1976] OLRB Rep. Oct. 621 the Board makes the following observation and direction:

44. Having regard to all of the evidence, therefore, the Board is left in doubt as to whether or not the grievor was discharged for union activity. Given the reverse burden provision of section 79(4a), when the Board entertains such doubt at the end of the case, it must resolve the doubt in favour of the complainant.

45. Accordingly, the Board directs that the respondent forthwith reinstate Mr. Robert Lahaie in the same position and with the same working conditions and benefits which he had on the date of his discharge and that he be compensated for lost wages. The Board remains seized of the matter to deal with any disagreement that may arise between the parties with respect to the assessment of compensation or any other aspect of the implementation of this order.

4. In the case at hand, the majority has found that "the respondent has not established on the balance of probabilities that no anti-union animus existed in the mind of the respondent." It was also noted that there was conflict in the evidence concerning the reasons for and probable duration of the lay-offs. Given the unsatisfactory state of the respondent's evidence, I cannot accept the majority finding that "some of the grievors would have been laid off on September 15th regardless of whether the respondent had received notice of application for certification that morning."

5. Where an employer has created a situation of uncertainty, it should be the employer who bears the burden of that uncertainty. Since there is a lack of satisfactory evidence with regard to the lay-offs, this uncertainty should be resolved in favour of the employees who have exercised their rights under *The Labour Relations Act* — not the employer who has been found to have violated that Act.

6. For this reason, I would have ordered that all employees be re-instated with appropriate compensation.

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## The Labour Relations Act

**NOTICE TO EMPLOYEES****Posted by Order of the Ontario Labour Relations Board**

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY LAYING OFF FOUR OF THE SIXTEEN GRIEVORS WHO WERE LAID OFF ON SEPTEMBER 15, 1980.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE  
LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE  
THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH  
THESE RIGHTS.

WE WILL NOT LAY-OFF OR FAIL TO RECALL FROM  
LAY-OFF ANY EMPLOYEE BECAUSE HE HAS SELECTED  
THE INTERNATIONAL UNION, UNITED AUTOMOBILE,  
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS  
OF AMERICA AS HIS EXCLUSIVE BARGAINING  
REPRESENTATIVE.

WE WILL RECALL TO ACTIVE EMPLOYMENT EACH OF THE  
FOUR GRIEVORS WITH THE LONGEST RESPECTIVE PERIODS  
OF SERVICE WITH THE COMPANY.

WE WILL PAY THE FOUR GRIEVORS WAGES AND OTHER  
BENEFITS LOST BY THEM (PLUS INTEREST) AS A  
RESULT OF THE VIOLATION OF THE ACT FOUND BY  
THE BOARD.

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STARPLEX SCIENTIFIC DIVISION OF  
CANADIAN MEDICAL LABORATORIES  
LIMITED

DATED: March 5, 1981

PER: (AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**



**2359-80-R** United Steelworkers of America, Applicant, v. Storwal International Inc., Respondent, v. Group of Employees, Objectors.

**Employee – Whether managerial and confidential exclusions apply to persons establishing work standards and dealing with union grievances relating to those – Board distinguishing decisions on time study analysts**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

**APPEARANCES:** *A. E. Munro and J. Grills for the applicant; Bill Phelps, Phil Goodfellow and Jean Bigras for the respondent; Gordon McLaughlin and Scott Deugo for the objectors.*

**DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; March 10, 1981**

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all office, clerical and technical employees of the respondent in Pembroke, Ontario, save and except Secretary to the General Manager, Secretaries in the Personnel Department, the Accountant, Supervisors, persons above the rank of supervisor and outside sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on February 11, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
5. The parties are disagreed on the employment status of three persons described as "Work Measurement Applicators". The respondent submits that they should be excluded from the unit because they exercise managerial functions and are confidentially employed in matters relating to labour relations within the meaning of section 1(3)(b) of the Act. The applicant submits that they are employees and should be included in the bargaining unit. The parties submitted an agreed statement of fact in addition to certain oral representations to assist the Board in resolving this dispute.
6. The agreed statement of fact is as follows:

The plant collective agreement agrees on a Methods Time Management incentive system, (Ex. 'F'). That system requires the specification of a standard time for each operation on each part of each product. For example the operation of drilling holes in a sheet metal panel is allowed a standard time and the forming of that panel in a brake

is allowed a separate standard time. There will be approximately 20,000 of these standards for the plant.

In February of 1980 the Company determined to replace its old production standards with new standards and transferred the 3 persons from doing other duties to become Work Measurement Applicators. At that time the development of the 20,000 new standards was commenced.

Methods Time Measurement develops standard times not by 'time study' with stop watches but rather by analyzing the individual body movements (e.g. reaching, gripping, lifting, placing) involved in an operation (e.g. drilling holes in a panel) and assigning a time to each movement. The total of those times becomes the standard time for that operation.

The responsibility of the Work Measurement Applicator is to analyze the operation, make the judgment on what motions are involved, assign times to those motions from a table of predetermined data and compute the total standard time for that operation. The WMA must exercise judgment in defining the constituent motions in the operation and determining which motions are necessary to the operation in the first place.

The fact that there are judgments to be made is illustrated by the fact that there have been disagreements between the Company and the Union over hundreds of these standards. Most of those disagreements are over the question of what motions are properly included in the operation.

The procedures of the collective agreement provide that the standards are developed by the Work Measurement Applicators on behalf of management in the first place. They are then shown to the Union and in the event of disagreement there is discussion between the representatives of the parties over whether the standard is correct. The WMA represents management in those discussions with the Union Incentive Representative.

Although a few of the standards are checked by a Supervisor most of them go forward to the Union directly from the WMA. Thus management's only input on the majority of the standards is through the WMA.

Payment of incentive workers is based upon these standards.

Work Measurement Applicators have been involved in re-checking operations following their discussions with Union time study representative. They also created the 'check sheets' for each department and determined the standard times for each motion at the outset of the new standards program.

During negotiations for the 1980 renewal of the plant agreement it was

clear that the impact of the new standards system (averaging a 35% reduction) would be a major issue. The WMA's prepared confidential preliminary analyses of the impact of these new standards several weeks prior to the negotiations and prepared further confidential analyses during the progress of negotiations. While the new standards are all eventually shared with the Union it was the advance analysis which was necessary to the determination of the magnitude of the problem which management faced and the preparation of a fair and constructive proposal.

The WMA's have made recommendations on the reduction of manpower in several production areas as a result of their analyses. These recommendations has been accepted in several instances (e.g. Storwal & Bigfellow lines).

7. Several more undisputed facts emerged during the course of argument. The three WMA's work under a supervisor. It is clear, however, that the standards which they produce become the standards adopted by the company. The sheer volume of the standards does not allow the supervisor to review each and every standard established by the work measurement applicators. The standards system is central to the incentive compensation scheme in the collective agreement. Consequently the decision of the WMA's have a direct impact on the wages of employees.

8. Those decisions are sometimes challenged by the union. The collective agreement makes express provision to deal with the development of standards and disputes about the appropriateness of a standard established by the work measurement applicators. It provides, in part, as follows:

#### *Incentive Grievances*

Before protesting the fairness of a production standard, the operator will give such standard a fair trial, consisting of four (4) hours, or one-third of the run, whichever is most practical.

When an employee believes that the standard time for his operation is sufficient, he shall first notify his foreman and his department steward.

The foreman and steward shall make a check to determine if the proper method is being followed.

If no satisfactory settlement is effected, the foreman shall immediately notify the Standards Department, who will immediately review the complaint and make a disposition of the case.

If the disposition is unsatisfactory, the Union Incentive Representative and the Grievance Committee, or, if desired, any accredited representative of the Union Engineering Department shall be called in to review the complaint. They shall then meet with the Standards Department to effect a settlement by:



- (a) reviewing the Standard Specification sheet to be certain that all elements are included;
- (b) review the application of standard data, if such has been used, to ascertain that the standards have been correctly applied;
- (c) should not settlement be effected after steps (a) and (b) then both parties, in presence of each other, shall re-evaluate the operation in question to determine the correct time value as herein defined;
- (d) whenever a re-evaluation becomes necessary as a result of an alleged inadequate time value, the aggrieved employee shall be studied whenever possible. There shall be an exchange of the performance rating of the employee being observed before the time study representative of the parties leave the job in question. All such re-evaluation will be performed by the MTM method;
- (e) if no agreement is reached by the above procedure, then the grievance shall follow the regular grievance procedure set forth in the collective agreement;
- (f) all grievances relating to the interpretation and administration of the Wage Incentive Plan shall be handled as grievances in conformity with the regular grievance procedure.

9. The union submits that the work measurement applicator is a technician whose job is to mechanically apply pre-established criteria to arrive at standards consistent with the internationally recognized Methods Time Management incentive system. In its view by observing an employee and applying pre-set values to each movement observed the WMA does not exercise any real decision-making authority that would make him managerial within the meaning of section 1(1)(n) of the Act. It further submits that while in the exercise of his functions he may have advance knowledge of standards to be applied to various jobs, that is knowledge which becomes known to the union in due course. In the union's view that knowledge is not confidential in the same sense as detailed knowledge of a company's budget or other data that goes to its bargaining strategy and is never made known to a union.

10. Counsel for the respondent concedes that within the scheme of the collective agreement the standards established by the WMA's must, in time, be disclosed to the union. He submits, however, that the time at which that information is released can have an impact on bargaining. He suggests that a union's response to company proposals on its compensation package could depend on its advance knowledge of standards about to be introduced if those standards might adversely affect the earnings of its members. He submits, that the company was faced with that problem as the new standards system was introduced and could again face that difficulty as new equipment, new processes and new standards are brought into the plant. On that basis counsel for the respondent maintains that the WMA's are confidentially employed in matters relating to labour relations.

11. The main thrust of the respondent's argument is that the WMA's exercise managerial functions and that the very nature of their work would place them in a conflict of

interest if they must also be part of a union. He submits that the WMA's are an integral part of the management team since what they do goes beyond merely recommending standards to be decided upon by some higher authority. He stresses that in establishing standards they make management's decision. He also emphasizes that the WMA's are the sole representatives of the company when the union grieves a standard. According to counsel for the respondent if the work measurement applicators are to deal with the union in those grievances they must do so from a point of view, and that point of view must be the company's. On that basis the respondent maintains that the WMA's would be in an obvious conflict of interest if they were themselves employees and not members of management. The union's representative replies that there can be no conflict of interest since the office and production employees are in different bargaining units and the union local contesting the standard is a different local from the one which would represent the WMA. It also argues that since the standards established by the WMA's are largely the result of a mechanical application of pre-established norms their decisions are not essentially a matter of independent judgment and grievances over standards are generally matters of objective fact.

12. The general principles to be applied in this case in assessing whether the individuals in question exercise managerial functions were usefully summarized in the decision of the Board in *Cottage Hospital (Uxbridge)*, [1980] OLRB Rep. Mar. 304 when, at pp. 305-306 the Board stated:

Over the years the Board has developed general guidelines to assist it in evaluating whether an individual exercises managerial functions (see *Inglis Limited*, [1976] OLRB Rep. June 270, *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396 and *McIntyre Porcupine Mines Limited*, [1975] OLRB Apr. 261). For those persons whose work has little or no impact on the employment relationship, the Board looks to whether or not they exercise independent decision-making responsibilities in matters of policy or the running of the organization. The Act does not operate to exclude those who only make effective recommendations in this regard. Nor does it exclude persons whose independent decisions are either circumscribed within pre-determined limits set by others or limited to technical and procedural determinations flowing from their expertise in a limited field. (See *Libby, McNeil and Libby of Canada*, [1976] OLRB Rep. May 193, *Inglis Limited*, *supra*; and *Dominion Stores Limited*, [1976] OLRB Rep. Aug. 44 and *Canadian General Electric*, [1979] OLRB Rep. Jan. 12).

Different considerations apply to the work of a second group of persons who may be characterized as having a direct effect on the employment relationship or the terms and condition of employment of those in the employ of the organization. Supervisors of employees of those technical experts whose work affects terms and conditions of employment policies would fall within this group. In determining whether such persons whose work has a direct effect on the employment relationship exercise managerial functions, the Board assesses whether or not they exercise effective control and authority over employees either in direct contact with the employees or through their decisions. In making this evaluation the Board looks to whether the person has, at a

minimum, the authority to make effective recommendations relating to conditions of employment. An effective recommendation is a 'serious recommendation that the evidence demonstrates is usually acted upon, and therefore a recommendation that materially affects the economic lives of employees'. (*McIntyre Porcupine Limited, supra*, at 289).

13. In light of the foregoing principles the issue becomes whether the WMA's are managerial because they exercise at least a power of effective recommendations affecting the economic lives of employees in establishing standards, and in subsequently compromising or refusing to compromise standards which are grieved by the union.

14. While we appreciate that there are some technical differences in the work performed by traditional "time study analysts" and the WMA's in the instant case, these two kinds of industrial engineering technicians do perform comparable functions. The Board's previous decisions respecting the inclusion or exclusion from bargaining units of time study men or methods men are therefore instructive for the disposition of this case. We should emphasize, by way of caution, that this general area tends to require close factual calls and the employment status of persons classified as work measurement applicators must, like the status of time study men, be determined on the merits of each particular case.

15. In *Canadian Acme Screw & Gear Limited*, [1967] OLRB Rep. Feb. 872 the Board was required to determine whether time study technicians exercised management functions. In that case the Board found that the responsibilities of the time study analysts extended beyond a merely technical role of performing and reporting on certain mechanical calculations. The individuals in that case made recommendations affecting the assignment of employees and the size of the work force. They also were involved with management in the discussion of employee grievances, and represented management in dealing with the union's representatives and its time study technicians. More particularly, they represented management in resolving differences between the union and the company on the application of time study data. They also advised management in assessing bargaining table proposals from the union relating to changes in standards and the method of setting standards. In those circumstances the Board concluded that the time study technicians were both managerial and confidential within the meaning of section 1(3)(b) of the Act.

16. In several subsequent cases the Board concluded that time study analysts were not managerial. In *Ferranti-Packard Electric Limited*, [1968] OLRB Rep. Sept. 572 the Board found that a group of time study and methods men were not confidentially employed in matters of labour relations. It was not alleged that they were managerial. The Board concluded that they did not exercise confidential duties, noting in the reasons for its decision that they exercised no substantial degree of independent decision-making. Essentially they provided their employer with facts. While they might make recommendations the ultimate decision was always made by some higher authority. The Board also noted that the time study and methods men in that case did not participate in the grievance procedure on behalf of management, "but rather are there in the neutral capacity of supplying facts".

17. The Board came to a similar conclusion in *The Canadian Blower and Forge Company Limited*, [1974] OLRB Rep. Nov. 771. The respondent in that case sought to exclude from the bargaining unit two methods planners who spent a significant portion of their work in methods and time study work. The Board found that there were no piecework



rates for employees in the plant so that the time study work did not affect rates of remuneration. It further noted that the time study technicians had little or no contact with bargaining unit employees concerning the establishment or review of standards, such disputes being resolved by higher authorities. On those facts the Board found that the time study men exercised a mechanical reporting function that did not involve the exercise of managerial authority.

18. In *Inglis Limited*, [1976] OLRB Rep. June 270, the Board came to a similar conclusion in respect of another group of time study analysts. In *Inglis*, as in the instant case, the collective agreement expressly provided for production standards to be established by the application of recognized industrial engineering techniques. As in this case, the collective agreement had a special grievance procedure for standards disputed by the union. In its decision the Board noted (at p. 280):

... The calculations of the time study analysts who are responsible for the initial timing of a job and for the 'line balancing' can give rise to union grievances. The time study analysts, are involved up to the point of restudying a job but have never been involved in the grievance procedure beyond this point. There is no evidence as to who performs the subsequent checks or who represents the company in discussion with the union or at arbitration. The evidence is clear, however, that it has never been the time study analysts.

19. In our view there are a number of vital distinctions between *Inglis*, *Canadian Blower and Forge*, *Ferranti-Packard* and the instant case. In the respondent's organization the work measurement applicators set the standards. That is not done by any higher authority in the respondent's organization and their decisions in that regard are not subject to any regular company review. When the company discharges its obligation to determine "methods of performance and sequence of elemental operations" as contemplated by the collective agreement it is the WMA's who make that determination for the company. While it is true that the setting of a standard is largely a mechanical exercise, there is room for some human judgment. For example, the WMA and the union may disagree on whether a certain movement is essential in a given operation. The very existence of a special grievance procedure attests to the fact that in this area the parties can and do differ.

20. When a dispute over a standard matures to the second stage of the grievance procedure it goes to the Standards Department where it is reviewed and can be disposed of in a manner favourable to the union. By the agreed statement of fact it is clear that at that point the Standards Department is represented by the work measurement applicator. If the matter is not satisfactorily resolved at that stage there follows a meeting between the union, represented in part by the Union Incentive Representative and the Standards Department in the person of the work measurement applicator. In the event of an agreed re-evaluation there is an exchange of data between the time study representatives of the parties, the company's representative again being the WMA. Disputes that remain unresolved beyond that point can proceed in the normal course to arbitration. Since the standards established by the WMA's have a direct impact on the earnings of employees it is not surprising that there have been a substantial number of grievances in this area. In all of them the WMA has represented the company, exercising the apparent authority to settle the dispute or see it carried to the next stage of the grievance procedure.

21. When these duties of the WMA's are considered in the light of section 1(3)(b) of the Act it is useful to recall the following passage from the Board's decision in *Inglis Limited*, (supra) at pp. 270-71:

Collective bargaining by its very nature requires an arm's length relationship between two sides whose interests, objectives and priorities are often divergent. It is critical in striking a bargain which is fair to both sides that the process elicit an open and exhaustive discussion of the respective objectives and priorities and that where these are in conflict the supporting rationale be advanced by persons whose loyalties are undivided. It is further imperative that the acceptance or rejection of whatever agreements arise from the bargaining process be made by persons of undivided perspective and that the subsequent on-going administration of the accepted bargain be by persons having a clear duty to one side or the other. The effective operation of the system of labour relations which presently exists in this jurisdiction is based on an underlying recognition of the inherent differences between the employer and the employees and the need for an arm's length relationship between the employer as embodied by those who exercise managerial function or are employed in a confidential capacity in matters relating to labour relations and the employees.

22. We agree with counsel for the respondent that the foregoing principles are paramount in the application of section 1(3)(b) of the Act. On the facts of this case they are controlling. It is clear that in establishing and defending standards which directly affect the wages of employees the WMA's act on behalf of the company. The respondent is entitled to expect that in so doing they operate from a perspective of undivided loyalty to their employer, and that is so regardless of which union may represent the employees affected by their decisions. If we were satisfied that the work measurement applicators were technicians with no responsibility beyond providing factual data to the company, as with the time study analysts considered in *Inglis*, our conclusion might be other wise. The facts in the instant case are, however, substantially different from those in *Inglis Limited*, *Canadian Blower and Forge Company Limited* and *Ferranti-Packard* (supra). Because the work measurement applicators make decisions on behalf of the company that directly affect the wages of employees and thereafter defend or compromise those decisions as the company's representative in the grievance procedure, they are more closely akin to the time study analysts in *Canadian Acme Screw & Gear Limited*, (supra). We must conclude that they exercise managerial responsibilities and are confidentially employed within the meaning of section 1(3)(b) of the Act. They are therefore excluded from the bargaining unit.

23. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER B.L. ARMSTRONG;**

1. I dissent.

2. I cannot agree with the majority determination concerning the alleged managerial and confidential status of the Work Measurement Applicators. In my view, these employees belong in the bargaining unit, and are not "managerial" or "confidential" in any meaningful sense of the terms.

3. The majority has apparently relied on the principles enunciated in *Cottage Hospital (Uxbridge)*, [1980] OLRB Rep. Mar. 304. In that case, the Board said:

Over the years the Board has developed general guidelines to assist it in evaluating whether an individual exercise managerial functions (see *Inglis Limited*, [1976] OLRB Rep. June 270, *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396 and *McIntyre Porcupine Mines Limited*, [1975] OLRB Apr. 261). For those persons whose work has little or no impact on the employment relationship, the Board looks to whether or not they exercise independent decision-making responsibilities in matters of policy or the running of the organization. The Act does not operate to exclude those who only make effective recommendations in this regard. Nor does it exclude persons whose independent decisions are either circumscribed within pre-determined limits set by others or limited to technical and procedural determinations flowing from their expertise in a limited field. (See *Libby, McNeil and Libby of Canada*, [1976] OLRB Rep. May 193, *Inglis Limited, supra*; and *Dominion Stores Limited*, [1976] OLRB Rep. Aug. 44 and *Canadian General Electric*, [1979] OLRB Rep. Jan. 12).

The principle would appear to be made to order for the case at hand. There is, in my submission, little difference between the Work Measurement Applicators and a typical time study analyst. As was pointed out in the majority decision, the Board has dealt with such employees in the past. Normally, such employees are not managerial — while they may make recommendations based on facts they have compiled, they do not exercise any independent decision-making power, and the ultimate power rests with some higher authority. (See specially *Ferranti-Packard Electric Limited*, [1969] OLRB Rep. Sept. 572. see also *The Canadian Blower and Forge Company Limited*, [1974] OLRB Rep. Nov. 771, and *Inglis Limited*, [1971] OLRB Rep. June 270.)

4. The case of *Canadian Acme Screw and Gear Limited*, [1967] OLRB Rep. Feb. 872 seems to support the majority view to some extent. However, the Board's language in that case seems to suggest that these particular time study technicians had a good deal of independent decision-making power:

In the instant case, however, the Board finds that in addition to certain reporting functions which are exercised by the time study technicians, they have other regular functions requiring the exercise of independent judgment. The time study technicians, in this case, make recommendations affecting the assigning of employees and at times affecting the reduction of the number of persons employed by the respondent. The time study technicians are involved in discussions with management with respect to the disposition of grievances, which discussions are confidential in matters relating to labour relations. They recommend that new employees be retained and are also asked to pick employees for the purposes of promotion. In addition, they represent management in dealing with union representatives and the union's time study technicians. They also represent management in resolving differences between the union's time study and the company's time study, and they



act on behalf of management in assessing the union's proposals for changes in the collective agreement which would affect standards and the methods of setting standards in the future. On the basis of the uncontested evidence of the manner in which the time study technicians in this case act on behalf of management, the Board finds that the time study technicians are required to perform more than a simple reporting function and are employed in a confidential capacity in matters relating to labour relations and exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act* and therefore are not employees of the respondent eligible for inclusion in any bargaining unit.

I cannot fit the case at hand into this mold. The situation more closely resembles that of *Ferranti-Packard Electric Limited, supra*.

5. I also must take issue with the majority application of the Board's principles as set out in *Inglis, supra*.

Collective bargaining by its very nature requires an arm's length relationship between two sides whose interests, objectives and priorities are often divergent. It is critical in striking a bargain which is fair to both sides that the process elicit an open and exhaustive discussion of the respective objectives and priorities and that where these are in conflict the supporting rationale be advanced by persons whose loyalties are undivided. It is further imperative that the acceptance or rejection of whatever agreements arise from the bargaining process be made by persons of undivided perspective and that the subsequent on-going administration of the accepted bargain be by persons having a clear duty to one side or the other. The effective operation of the system of labour relations which presently exists in this jurisdiction is based on an underlying recognition of the inherent differences between the employer and the employees and the need for an arm's length relationship between the employer as embodied by those who exercise managerial function or are employed in a confidential capacity in matters relating to labour relations and the employees.

When it is remembered that these employees would not be in a production bargaining unit, but rather an office unit, the "conflict of interest" approach is just not convincing. Any decisions made by the employees would not directly affect their own bargaining unit.

6. I agree with the union with respect to the alleged confidentiality of the Work Measurement Applicator job. The information to which the individuals have access is obtained by a simple application of pre-established criteria to tasks being performed by employees. There is nothing even remotely confidential about the knowledge so obtained.

9. For these reasons, I dissent from the majority's decision with respect to the status of the Work Measurement Applicators.

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**0309-80-R International Union of Operating Engineers, Local 793,  
Applicant, v. Warren Bitulithic Limited, Respondent.**

**Certification – Construction Industry – Whether off-site employees included in the count –  
Board interpreting section 106(b)**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

***APPEARANCES:** Jack Redshaw for the applicant; Joseph Carrier, Ron Patterson and Eric Yonke for the respondent.*

**DECISION OF THE BOARD; March 10, 1981**

1. The applicant is seeking certification with respect to a bargaining unit of all employees of the respondent working in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman. The respondent, in its reply, was in agreement with the proposed bargaining unit.

2. The parties were, however, in dispute as to the number of employees in the appropriate bargaining unit for the purpose of the count. A Labour Relations Officer was appointed to inquire into and report to the Board on the list and composition of the bargaining unit.

3. The report of the Labour Relations Officer contains, among other matters, an agreed statement of fact which is now set forth as follows:

***AGREED STATEMENT OF FACT***

1. The parties agree that the work performed by the following persons on the date of application was as shown on the attached, amended "Draft Statement of Fact":  
  
A. Albrecht, H. Fisher, R. Gutscher,  
C. Leslie, H. Lozanski [sic], Z. Melderis,  
R. Wagler, E. Wagler.
2. The Parties agree that those persons named above did not work on a construction site on the date of application.
3. The parties agree that the Company primarily produces granular material and asphalt for use on its own construction projects, however, it does sell such materials to others when requested. On such occasions, the customer contacts the Company and arranges to pick up the material at the Company's yard. On the date of application, no such material was sold to others.

4. The parties agree that those persons named above are subject to the same wages, hours of work, statutory holiday and vacation pay as the persons agreed by the parties to be included within the bargaining unit.
5. The parties agree that W. Wagler, D. Knowles and P. Flanagan were hired at the Company's office in the area and regularly worked in the area on equipment claimed to fall within the Applicant's jurisdiction, both on site and off site (on the Respondent's property). On the date of application, these persons reported for work at the Company's office and yard in the applied for Board area and were dispatched from there to work outside the Board area.

They were paid from the time they reported to the Company's office and received one hour travel time as they travelled through the Board area.

These persons are employees of the Company's Kitchener Division, were paid from that office and are subject to the same wages, hours of work, statutory holiday and vacation pay as those persons agreed by the parties to be included within the bargaining unit.

Wagler and Flanagan performed work on the date of application at the Company's Mississauga plant operating a front-end loader and a portable crusher. This work was not on a construction site and was outside of the applied for Board area.

Knowles worked on a construction site on the date of application. The construction project was in Milverton which is outside of the applied for Board area.

This was the only construction project undertaken by the Company outside the applied for Board area and was of approximately two weeks duration.

6. The parties agree that all employees are under the supervision of the Kitchener District Manager.

The major supervision of employees on construction projects is performed by the District Superintendent who reports to the District Manager.

Both District Superintendent and the District Manager visit the construction sites on a daily basis.

All labour relations matters for all employees, including those in the applied for bargaining unit are controlled by the District Manager and the head office of the Respondent.

7. It is agreed by the parties that some of those persons not agreed



by the parties as being appropriate for inclusion within the applied for bargaining unit work on site operating equipment from time to time and some of those persons who the parties have agreed are included in the bargaining unit, work in the Company's pits and plants from time to time operating equipment. None of the persons (as listed in Item 1 of this agreement) worked on a construction site in the 1980 construction season prior to the date of application.

8. It is agreed that the date of application is May 8, 1980.
9. It is agreed that the Company's construction season began on May 6, 1980.
10. It is agreed that Atkinson, J. Hiller, I. Hodder, S. Hunchak [sic], K. Locke, J. Martindale, J. Moffat, A. Mastin [sic], and D. Hiller worked in the Company's pit at plant operation located in the Company's yard prior to May 6, 1980. The date of hire for the new construction season and the type of work performed are outlined in Schedule "A" attached hereto.

4. The parties agree that the following persons are properly included within the applied for bargaining unit:

D. Atkinson  
I. Hodder  
K. Locke  
J. Martindale  
J. Moffat  
J. Hiller  
A. Martin  
D. Hiller and  
G. Hunchak.

5. The parties are not in agreement with respect to certain persons. The applicant has adopted the position that these persons were not working on the construction projects being undertaken by the respondent on the date of the application. These persons are:

A. Albrecht  
H. Fisher  
R. Gutscher  
C. Leslie  
H. Lozinski  
Z. Melderis  
R. Wagler and  
E. Wagler.

6. The parties are also not in agreement with respect to certain other persons. The applicant has adopted the position that these persons were not working on construction

projects within the geographic area of the applied for bargaining unit on the date of the application. These persons are:

W. Wagler  
P. Flanagan and  
D. Knowles.

7. The respondent has adopted the position that the persons referred to in paragraphs five and six are appropriate for inclusion in the applied for bargaining unit by reason of the provisions of section 106(b) of the Act. Section 106(b) states:

In this section and in sections 107 to 124,

...

(b) "employee" includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees;

8. The evidence before the Board establishes that the persons referred to in paragraph five did not work on a construction site on the date of the making of this application. The draft statement of fact establishes that these persons were working at the respondent's pits at either New Dundee or Manheim. Messrs. Albrecht, Fisher, Gutscher, Leslie, Lozinski operated front-end loaders in connection with the loading, washing or storage of construction materials. Mr. Melderis operated the washing plant at the pit at New Dundee, Mr. R. Wagler worked as the batcher at the asphalt plant at the pit at New Dundee and Mr. E. Wagler worked as the crusher plant operator at the pit at New Dundee. The materials from these pits are sent to and used on various construction jobs in the area. There is no indication, however, that any of the persons in paragraph five were engaged in the delivery of such materials. The respondent primarily produces construction materials for use on its own construction projects. However, the respondent does sell such materials to others when requested. On the date of the making of this application such materials were not sold to others.

9. The evidence further establishes that the persons referred to in paragraph six were not employed on construction sites on the date of the making of this application. While they were hired at the respondent's office in the area and regularly worked in the area on equipment claimed to fall within the applicant's jurisdiction both on site and off site on the respondent's property, on the date of the making of this application they were dispatched to work outside the geographic area in the applied for bargaining unit. On the date of the making of this application Mr. W. Wagler and Mr. Flanagan worked at the respondent's Mississauga plant operating a front-end loader and a portable crusher and not on a construction site. While Mr. Knowles worked on a construction site on the date of the making of this application, this site was outside the geographic area in the applied for bargaining unit.

10. It appears that some of the persons referred to in paragraphs five and six worked on site operating equipment from time to time and that some of the persons referred to in paragraph four worked in the respondent's pits and plants from time to time operating equipment. However, none of the persons referred to in paragraph five worked on a construction site in the 1980 construction season prior to the date of the application. The persons referred to in paragraph four worked in the respondent's pit and plant operation located in the respondent's yard prior to the 1980 construction season and performed a variety of tasks

such as preparing, repairing and washing the plant, shop work, preparation of spreader, and moving construction materials.

11. In applications for certification which are filed under the construction industry provisions of the Act, the list for the purpose of the count is the number of persons in the appropriate bargaining unit on the date of the making of the application. The parties are in agreement that such a list consists of the nine persons referred to in paragraph four. The question to be determined is whether any or all of the persons referred to in paragraphs five and six ought to be added to this list.

12. Section 106(b) defines employee as including an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees. There was no evidence before the Board with respect to whether the plant, pit and site employees are associated in their bargaining with on-site employees. The Board has previously considered situations where it was argued that certain employees were engaged in whole or in part in off-site work but who are commonly associated in their work with on-site employees. See *C. A. Pitts Engineering Construction Ltd.* [1973] OLRB Rep. Feb. 123; *Taggart Construction Limited* [1974] OLRB Rep. March 190; and *Esam Construction Limited* [1980] OLRB Rep. Feb. 197.

13. In the instant case there is no indication of the degree or frequency to which employees interchange between off-site and on-site work. In *Taggart Construction Limited*, *supra*, the Board held that where such interchange occurred only rarely, uncommonly and briefly off-site employees were not commonly associated in their work with on-site employees within the meaning of section 106(b). While it is clear that most of the construction material is destined for the respondent's own use, the fact that pit and yard work is part of a sequence of operations which leads up to on-site work is not, in itself, sufficient to make off-site employees commonly associated in their work with on-site employees. See *C. A. Pitts Engineering Construction Ltd.*, *supra*. There is no indication in the instant application that the off-site employees spend time on construction sites on other days on a regular basis. In *Esam Construction Limited*, *supra*, the Board included on the list for the purpose of the count two off-site employees who spent time on a construction site on other days on a *regular basis* and found that they were commonly associated in their work with on-site employees within the meaning of section 106(b).

14. In the instant case, the Board, on the criteria laid down in the preceding paragraph, is not prepared to find that any of the persons referred to in paragraphs five and six are to be added to the list of employees for the purpose of the count because the Board finds that such employees are not employees within the meaning of section 106(b).

15. At the hearing the applicant clarified its position with respect to the appropriate bargaining unit and informed the Board that this application for certification was made pursuant to the provisions of section 131a(3) of the Act.

16. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

17. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*.



18. The Board further finds that this application for certification does not related to the industrial, commercial and institutional sector of the construction industry referred to in section 106(e) of *The Labour Relations Act*.

19. The Board further finds that all employees of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, and excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

20. For the purpose of clarity, the Board declares that employees who are working in the respondent's pits, plants and yards are not included in the bargaining unit.

21. The list for the purpose of the count consists of the nine persons referred to in paragraph four. The applicant filed evidence of membership of the type referred to at the hearing on behalf of five of these nine persons.

22. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 20, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

23. A certificate will issue to the applicant.

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**1329-80-U; 1667-80-U United Cement, Lime and Gypsum Workers International Union, Complainant, v. Westroc Industries Limited, Respondent.**

**Charges – Duty to Bargain in Good Faith – Lock-Out – Union stalling negotiations – Employer tabling new proposals – Locking out employees and employing temporary replacements – Whether lock-out discriminating or intended to deny exercise of rights under Act – Propriety of use of lock-out replacements – Whether tabling new proposals bad faith bargaining.**

**BEFORE:** George W. Adams, Chairman and Board Members J. A. Ronson and O. Hodges.

**APPEARANCES:** *Elizabeth J. Shilton-Lennon, David Coté, Rien Joris and Ed Mattocks for the complainant; R. W. Kitchen, W. D. Barnes and J. D. Quinn for the respondent.*

**DECISION OF GEORGE W. ADAMS AND J. A. RONSON; March 4, 1981**

1. The complainant trade union has filed two complaints under section 79 of *The*

*Labour Relations Act*. The first was filed on September 25, 1980 alleging a violation of section 14. Its primary focus is the alleged retabbling of demands by the respondent company in the late stages of negotiations. The second complaint was filed on November 3, 1980 and it alleges violations of sections 14, 56, 58, and 61 of the Act. It challenges the respondent's conduct in locking out its employees and the hiring of replacements. The matters were brought on at the same time and, by order of the Board, consolidated.

### *History of Negotiations*

2. The respondent is a manufacturer of wallboard. It has five manufacturing facilities across the country and three gypsum mines. It bargains with the complainant union and its various locals at all of these locations. The instant matter arises out of current collective bargaining negotiations at the respondent's Mississauga plant. The bargaining unit consists of 105 employees. The principal classifications are truck drivers, maintenance employees, warehouse and shipping employees and production employees. The complainant trade union was certified at this location in 1963. The respondent's relationship with the complainant across the country is a longstanding one and the respondent voluntarily recognized the complainant at a new Calgary facility when it opened.

3. Current negotiations involve the renewal of a collective agreement negotiated in 1978 and which expired March 31, 1980. Strike activity has occurred twice at this location — in 1974 and 1978. In this round of negotiations, notice to bargain was given by the complainant union on January 25, 1980 and it forwarded its proposals to the company on March 10, 1980. The company proposals are dated March 21, 1980. Pre-conciliation meetings between the parties were held on March 24, April 9, 10, 11, 23, 24, 25 and May 5, 1980. The complainant applied for conciliation on May 6, 1980. Additional meetings were held on June 19 and July 4, 1980. From any objective viewpoint, negotiations were slow and very frustrating. Despite the large number of meetings up to this point in time, many matters remained unresolved. From the Board's vantage point, the negotiations lacked direction and any sense of momentum. And to a certain degree this must be attributed to the conduct of the union committee. After it presented its initial demands in March it appears to have encountered difficulty in setting priorities. We note that no additional articles were "signed off" between the parties after May 5, 1980 and Mr. Joris who was chairman of the negotiating committee indicated that "next to none" progress was made at the May 5, 1980 meeting. He testified in his examination in chief that at this point articles 3.05(a), 3.05(b), 5.07, 5.08(d), 6.05(a), 7.05, 7.06, 14.07(a), 14.07(b), 14.07(c) and 20.11 remained in dispute. Moreover, there had been little or no discussion of the monetary items. No progress was made at the meeting with the conciliation officer on June 19, 1980 but Mr. Joris "didn't think [there] was going to be a problem." Joris did think, however, that major differences existed in the areas of pension, overtime, and the union's claim for a 4 hour pay penalty provision for all violations of the collective agreement.

4. Before reviewing Mr. Joris' testimony in cross-examination, the bargaining format adopted by the parties in the context of the negotiations over Article 3 should be considered, particularly in light of the allegations that the company improperly retabbed demands in late August. Article 3 appeared in the expired collective agreement in the following form:

#### *ARTICLE 3 – WORK EXCLUSIONS*

3.01 No person outside the bargaining unit shall perform work that is

customarily performed by employees in the bargaining unit; except as outlined in the following:

It is understood that they may instruct, inspect and experiment. (Experiment: An operation carried out under controlled conditions in order to discover an unknown effect or law to test or establish a hypothesis).

3.02 In the case of emergency they may take the action necessary to avoid injury, loss of life or property, materials or machinery. Action under this section shall be construed as immediate action and not a work function by a non-bargaining unit employee.

3.03 (a) The company reserves the right to contract out any work of a construction nature, or maintenance work which requires equipment, facilities and persons not readily available. The Company shall, wherever possible, rent equipment that is readily available.

(b) The Company agrees to notify the Plant Chairman and the President of Local 366 in writing wherever possible one (1) week in advance and meet with the Union upon request of the Union for explanation of the reasons causing the Company to decide to contract any construction or maintenance work.

(c) It is understood that the contracting out will not result in a lay-off of members in the maintenance departments.

(d) In the event of contracting out by the Company the maintenance employees who normally perform such contracted out work shall be offered, at the same time the work is performed, all hours worked by the outside contractor.

3.04 The Company agrees that it will not contract out any part of its operation connected with the delivery of its products except for the following:

(i) Where equipment is broken down or under repair.

(ii) Where there is equipment available but there are no qualified drivers available to deliver the product(s) or Material(s) at the time specified by the customer(s).

(iii) When equipment has not returned to the plant by twelve (12) noon on Saturday and dispatch is required for early Monday a.m. delivery.

(iv) Where the product load is to be delivered outside the sales area west of the present Ontario region.



- 3.05 (a) For any violation of Section 3.01 and 3.02 of this Article, the Company shall be required to pay four (4) hours at the applicable hourly rate of pay to the most senior employee(s) who is qualified to perform the type of work involved and who files a grievance that is found to be valid.
- (b) For any violation of Section 3.03 or 3.04 of this Article, the Company shall pay for the hours and/or miles contracted out at the applicable rate or a minimum of four (4) hours at the applicable hourly rate to the most senior employee(s) who is qualified to perform the type of work involved and who files a grievance that is found to be valid. Any settlement under this section shall not exceed the number of contracted employees concerned nor total hours worked.

The union's demands on this article read:

*ARTICLE 3 — WORK EXCLUSIONS*

3.01 No Change

3.02 No Change

3.03 (a) *ADD* — Where it is necessary to contract out any work of maintenance and construction, such work to go to unionized workers.

(b) No Change

(c) *REPLACE WITH* - It is understood that there will be no contracting out of any construction or maintenance work while any member is on lay-off.

(d) No Change

3.04 (i) No Change  
(ii) No Change  
(iii) No Change  
(iv) Delete

3.05 (a) Delete: "of Section 3.01 and 3.02 of this Article" to read: of the Agreement

(b) *ADD* Section 3.01 and 3.02

(c) *NEW* For any violation of this Agreement and the Union files a policy grievance, the Company shall pay a penalty at a minimum of four (4) hours at class 20.

(d) *NEW* For every load hauled by outside carriers, the Com-

pany shall pay one (1) hour pay at driver classification rate to our local Union.

The following caveat is found at the end of the 15 page document in which this demand is located:

The Union reserves the right to alter its position on the proposal and/or to submit further proposals during negotiations.

The company's position on Article 3 is found in its one page proposal of March 21, 1980. On this item the proposal reads:

3.04 Change to read — The Company reserves the right to contract out any trucking services or vehicle maintenance work.

And at the bottom of the page, the following reservation is added:

The Company reserves the right to alter its position on the proposals submitted and/or to submit further proposals during negotiations.

At their meeting of April 24, 1980, it appears that the parties agreed to "no change" in articles 3.01 to 3.04 (the union maintaining its position on 3.05) and those articles in their entirety were "signed off" by the parties. But the following reservation appears at the top of each page contained in the binder in which "agreed language" is kept:

This language is agreed subject to final agreement on all matters outstanding.

5. On cross-examination, Mr. Joris admitted that the union stuck to its article 3.05 demand notwithstanding a company offer to delete articles 20.11, 20.12 and 20.13 (provisions dealing with misconduct) and despite the company's willingness to draft a "letter of intent" to deal with the problem to which the union's proposal was directed. Joris described the problem as a failure of line management to honour previous understandings between the parties on the proper application of the contract. Joris also admitted that the union negotiating committee had sent a letter to the Chairman of the Board of Directors of the parent company in London, England commenting adversely on the company's bargaining. A copy was not given to company negotiators but Mr. Prendergast, President of the respondent company, was asked to reply. He refrained from commenting adversely on the union's conduct; outlined the company's need for a quality product and its commitment to its employees; and indicated his confidence in the company's bargaining committee. At the meeting of July 14, 1980, and notwithstanding the many other items outstanding, the union placed two additional items on the bargaining table. One related to the identity of insurance carriers and the other requested a drug plan and extended health care plan for pensioners.

6. The respondent company came to believe that this style of bargaining (or the lack thereof) was aimed at delay in order for the union to achieve simultaneous negotiations at the Montreal, Winnipeg, and Toronto plants. These three agreements were to expire in September. Adding to this suspicion was the formation by the complainant of a Canada-wide Westroc Co-ordinating Committee in November of 1979; the union's rigid position on Article

3.05 which Barnes saw as totally unrealistic; and a sister local union's demand for an expiry date at the British Columbia plant similar to that found in the Mississauga contract. The company was therefore anxious to achieve an agreement for its Ontario plant by mid-summer and decided in early July to try and inject its own sense of urgency into the negotiations and to convey its frustration with the lack of progress to that point in time. Accordingly, at the meeting of July 14, 1980 the company tabled a complete proposal on all items. In tabling the offer, Mr. David Barnes, Manager of Employee Relations and the company's chief negotiator, said it was not the company's final offer and that the company "was still pretty flexible on wages and benefits." But he stressed that he "wanted a deal this week." It was Barnes' testimony that, without even reading the content of the proposal, committee members turned to the company's proposed letter of intent to deal with Articles 3 and 5 and stated that it was "no good." He pleaded with them to review all aspects of the proposal first but there was a reluctance to discuss anything other than the union's demand for a four hour penalty clause. The committee, however, agreed to review the proposal over the lunch break and returned to say that they had to have "the four hours." Barnes then advises that the union had to come back with a proposal and that he did not have many alternatives if they did not respond. The union, however, refused to counter with its own proposal and Joris told Barnes "you got to do what you got to do" in response to Barnes' comment that the company was not left with much of an alternative.

7. The company was now firmly of the view that the union was stalling until the Montreal contract expired on September 13, 1980 and then it would exploit the vulnerability of the company "with two plants down in the east." The company therefore decided to lock the Mississauga employees out "to put pressure on the union to reach a deal with the company as soon as possible." Barnes told the Board that two years ago negotiations had been overly lengthy and the union struck the company with no advance notice. Indeed, employees simply walked out of the plant leaving the machines running. This time the company wanted an orderly shutdown it could control and this was the only chance, in its view, to get a contract in advance of negotiations in Vancouver, Montreal, Winnipeg, and Calgary. Barnes called Ed Mattocks, a district representative for the union, and told him that a lockout would go into effect July 20, 1980. Barnes testified that Mattocks said he did not see the company had much choice and that "maybe this is what these guys need." On July 18, 1980 the following notice was posted in the plant:

#### *MISSISSAUGA NEGOTIATIONS*

As you know, both parties have been endeavouring to reach a collective agreement since March. The Company put its most recent offer to the Union Committee on July 14th. To date, there has been no response or counter offer by the Union Committee.

In light of the stalemate in the negotiations process, the Company regretfully made the decision, after careful consideration, to exercise its right under the Labour Relations Act to lock out employees at the Mississauga Plant, effective Sunday, July 20th, 1980.

The Company is advising the Union of its position on benefits continuation in view of the closing. Any employees concerned about coverage on any Company benefit, should contact the Union.



Final pay cheques will be mailed shortly.

8. Joris then called Prendergast on the pretext that there was a serious misunderstanding in the area of fringe benefits causing the impasse and asked for a meeting. When Joris arrived at the meeting arranged by Prendergast, he admitted that there was no misunderstanding and that the biggest issue was the four hours penalty pay. In an effort to avoid the lockout the company made another proposal. The union instead responded by making its own new proposal that COLA be folded into the salary base rates at the end of the first year of the proposed contract and when the company made a counter proposal members of the committee simply got up and began to leave the meeting. The lockout was implemented. Picketing by the employees commenced immediately thereafter and Barnes testified that some of the signs carried by picketers were in French and made reference to the Montreal plant.

9. Another complete proposal was tabled by the company July 31, 1980 but little or no progress was achieved. Barnes illustrated his frustration with the union's conduct by reference to the bargaining moves made by the complainant after the lockout. For example, the union had been asking for a \$5,000 penalty clause for failing to provide it with a copy of the insurance and indemnity policies and after the lockout it reduced this demand to \$2,500. In Barnes' view the committee continued to refer to demands that should have been settled long before this point in time. This situation continued into August with the union at one point proposing to accept the company's pension offer (an offer by then accepted at the British Columbia plant) if the company granted all the other union demands. At no time in August did the union make a complete proposal and it continued to focus on isolated contract items. In Barnes' view, the union did not seem to have a plan or know where it wanted to go. Despite the lockout, many items (minor and major) remained outstanding and there seemed to be no urgency on the part of the union. The company therefore decided to convey its seriousness by tabling (or retabbling) three new and important proposals on August 28, 1980. It wished to be relieved of the restrictions on contracting out in the areas of (a) maintenance, and (b) trucking, and (c) it wished relief on the issue of crew size. Barnes also emphasized to the union that there would be no retroactivity. Barnes told the committee that it still wanted a contract but the company needed relief in these three areas. He said the two factors causing the company to reassess its position were the deteriorating wallboards market and the progress of the negotiations. He pointed out that the collective agreements of the company's competitors were not as restrictive and that the respondent company's contract was "richer." Barnes told the Board that the company felt an early deal was not possible; the usual heavy demand for its product in the summer, anticipated in April, had not materialized; it was into a fight and therefore might as well try to achieve relief where it needed it; and the union did not appear to be taking negotiations seriously. As it turned out, the company was able to achieve contracts at all locations other than at the Mississauga plant. However, the negotiating committee refused, and continues to refuse, to discuss the company's additional proposals. The lockout has also continued.

10. The complainant trade union has challenged the company's right to try and operate despite having locked out its employees. The evidence with respect to continued operations is not in controversy. Barnes testified that the plant resumed operations two or three days after the lockout was implemented but that the shipping of the product did not occur until August 20, 1980. Operations were conducted by foremen, other supervisors and some existing clerical staff. No new persons were hired by the company until mid-September and only one or two at a time. The company hired "by word of mouth" and these employees tended to be students and friends of the supervisors. Every person hired was told that he was being offered a job only for

the duration of the lockout and he was subject to being without a job on very short notice. Barnes said they were people looking for short-term work. These employees were paid the rates under the earlier contract and O.H.I.P. (but no other benefits). Barnes explained that by using new hires and supervisors the company has been able to maintain one shift and that the company operated in order to try and maintain its share of the market. He noted that both of its major competitors had and continue to have substantial excess capacity. The Board was advised that the complement for a normal shift is 67 employees and that during the lockout only eighteen to twenty people have been running the plant. The Board was also advised that the shipping of product was effected through the service of an outside contractor (i.e. 80% of the product) along with some of "the temporary replacements." He admitted that if there was a collective agreement in place the company would not be using the outside contractor. He also admitted that the union was not told about the use of temporary replacements or the outside contractor. He admitted that if business conditions were better, the company would not be able to service its customers as well as it has. The Board was advised that up until the end of November the company experienced losses of \$880,000 and an additional \$160,000 loss was sustained in December. Mr. Prendergast said that it is inefficient to operate only by way of supervisors and untrained personnel and that these losses were due to the bargaining impasse. He further advised that some product has been brought in from the company's Montreal plant to service Ontario customers.

11. Finally, we find as a fact that all of the conversations between Mr. Schaeffer, a bargaining unit employee, and Mr. Prendergast were at the instigation of Schaeffer who was concerned about the negotiations and the leadership of the union negotiating committee. Contrary to the complainant's allegations, we find as a fact that Prendergast did *not* say:

- 1) He wanted everybody off the negotiating committee especially Rein Joris, the plant chairman,
- 2) he would prefer to deal with the Teamsters,
- 3) the respondent intended to leave the employees out long enough to break the union and then hire replacement employees.

In our view, Mr. Prendergast has conducted himself in a perfectly proper manner throughout the negotiations. We observe that the allegations of the union with respect to his conduct are almost totally unrelated to the evidence the union tendered to establish them. And, finally, we note that no locked out employee has applied for work and that the parties met October 21 and November 21 under the auspices of a Ministry of Labour mediator, but no progress was achieved.

### *Argument*

12. Ms. Lennon, on behalf of the trade union, addressed herself to three issues: (a) the legality of the lockout itself; (b) the propriety of the company's use of lockout replacements; and (c) the retabling of proposals on August 28, 1980. With respect to the lockout, it was submitted that the timeliness of a lockout does not itself insure that the lockout is lawful. The conduct of an employer continues to be governed by the unfair labour practice sections of the statute and it was Ms. Lennon's submission that the lockout in question had the improper purpose of causing employees to refrain from exercising rights under the Act. In this regard we

were referred to *Irving Oil Ltd. v. Oil, Chemical and Atomic Workers International Union, Local 9-691* (1980), 80 CLLC ¶12,264 (N.B.C.A.). She submitted that there was very little objective evidence of a Canada-wide “squeeze play” by the trade union and the employer provided no justification for the continuation of the lockout after the Montreal plant settled in October. It was also submitted that the lockout was really intended as a “cheap and easy lay-off” aimed at avoiding the payment of lay-off benefits under Article 17 of the expired collective agreement. Ms. Lennon stressed that the company had failed to demonstrate any bona fides business purpose for its lockout action. On the issue of lockout replacements, it was argued that the hiring of replacements amounted to discrimination against those persons represented by the complainant trade union. It was submitted that on this basis the company’s actions in (a) subcontracting work to an outside trucking firm; (b) using non-bargaining unit personnel to perform bargaining unit work; and (c) hiring replacements, violated sections 56 and 58 of *The Labour Relations Act*. Ms. Lennon contended that support for the union position could be found in section 64 where only striking employees are entitled to make unconditional applications for work at any time during the first six months of a strike. She submitted this was evidence of a legislative intent that employers were clearly prevented from hiring lockout replacements by sections 14, 56 and 58. She further submitted that locked out employees could not, given the statutory definition of a strike, subsequently engage in strike activity and thereby trigger section 64. She also contended that a reading of the American approach to this problem supported the union’s position and the Board was referred to *American Shipbuilding Co. v. NLRB* (1965), 55 LRRM 2672; *NLRB v. Brown et al* (1965), 380 U.S. 278; *Inland Trucking Co. et al* (1969), 179 NLRB 350; *Ottawa Silica Company et al* (1972), 197 NLRB 449; *Inter Collegiate Press et al* (1972), 81 LRRM 1508, affirmed 84 LRRM 2562 (C.A. 8th Circ.); 85 LRRM 1563; *Ozark Steel Fabricators Inc.* (1972), 81 LRRM 1501; *Johns-Manville Products* (1976), 92 LRRM 1103. On the issue of the retabling of proposals by the company, Ms. Lennon submitted that there had been progress in the negotiations and that there was no evidence of significant change in circumstances justifying a change in the company’s position. She submitted that the retabling of the proposals was designed to bring negotiations to a halt which was exactly the result achieved. She emphasized that no warning had been given to the union and relied upon *Pine Ridge District Health Unit*, [1977] OLRB Rep. February 65; *Toronto Jewellery Manufacturers Association*, [1979] OLRB Rep. July 719; *Wellington-Dufferin-Guelph Health Unit*, [1979] OLRB Rep. Nov. 1115; and *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397. The union requested the following remedies:

- (1) A declaration that the Respondent has violated *The Labour Relations Act*.
- (2) A direction that the Respondent cease and desist from the further violations of the Act.
- (3) A direction that the Respondent forthwith terminate its lockout and reinstate bargaining unit employees.
- (4) A direction that the Respondent pay compensation to all employees in the bargaining unit for damages sustained by them as a result of the Respondent’s breaches of the Act.
- (5) a direction that the Respondent pay compensation to the Complainant union for damages sustained by it as a result of the Respondent’s breaches of the Act.



- (6) A direction that the Respondent attend at series of meeting under the auspices of a mediator and bargain in good faith and make every reasonable effort to reach a collective agreement.
- (7) A direction that the Respondent post a Board notice in the usual form and in the usual locations for a period of 60 days from the conclusion of the lockout, and mail copies of the notice to each employee in the bargaining unit forthwith.

13. On behalf of the respondent company, Mr. Kitchen encouraged the Board to examine the totality of the respondent's conduct in the light of its longstanding Canada-wide relationship with the complainant trade union. He pointed out that eighteen negotiation meetings had taken place and that the company was justified in its frustration with the union negotiating committee's conduct. He stressed that the lockout; the use of replacements and supervisors; and the retabling of proposals were all intended to achieve a contract and impress upon the union the seriousness of the exercise. He pointed out that the replacements were clearly hired on a temporary basis; they were paid the "old rates"; the union acted as if it was on strike; and the company was acting in a genuine concern over the union's delay and the declining wallboard market. He also emphasized that no locked out employee had requested employment. Mr. Kitchen argued that each party had acted in its own self-interest; the company availed itself of a legitimate economic weapon; and this Board ought not to act as an arbiter over which economic weapons are available to labour and management. He submitted that the lockout was timely and that the company's motive was free of any anti-union animus. On the hiring of lockout replacements, counsel pointed out the Board's earlier implicit acceptance of such company action found in the *Ottawa Journal* trilogy. See *Journal Publishing Company of Ottawa*, [1977] OLRB Rep. June 309; [1977] OLRB Rep. Sept. 549; and [1978] OLRB Rep. May 427. On the issue of the retabling of proposals, counsel submitted that the signing off of those issues occurred in April 1980; each party had explicitly reserved the right to revise its position and even the union had availed itself of this right; the negotiations had dragged; and the wallboard market had severely declined by mid-summer. Against all of the foregoing and having regard to the fact that its lockout strategy was proving costly, the company, it was submitted, was more than justified in reassessing its position. Counsel submitted that this action, against the totality of the negotiations, revealed only good faith.

14. We have come to the conclusion that both complaints must be dismissed in their entirety. From a review of all of the evidence, we are satisfied that none of the impugned conduct of the respondent company violates sections 14, 56, 58 or 61 of the Act.

15. This Board has never before directly addressed itself to the propriety of an employer using replacements during a lockout. Interestingly, the matter was not raised in the *Ottawa Journal* set of cases although the issue has attracted much attention in the United States for many years. Counsel to the respondent relied heavily on the May 1978 *Ottawa Journal* decision of this Board that dealt with the status of lockout replacements in the context of a termination application and the Board's observation that "[i]t is well established in this jurisdiction that employers are permitted to hire strike or lockout replacements, who, in the normal course, are considered to be within the bargaining unit and who are entitled to initiate termination proceedings and to vote in any subsequent representation vote." However, an alleged unfair labour practice because of the hiring of lockout replacements was not before the

Board and, as we noted above, we know of no Ontario case (indeed we know of no Canadian case) that has established an employer's right to hire lockout replacements. But there is statutory language throughout Canada, including in Ontario, that suggests employers may well operate during a lockout. See *Quebec Labour Code*, R.S.Q. 1977 as amended s.109a; *The Trade Union Act*, S.N.S. 1972, c.19 as amended s.99; *Industrial Relations Act*, R.S.N.B. 1973, c.1-4, s. 50; *The Labour Act*, R.S.P.E.I. 1974, c.L-1, s.59; *The Labour Relations Act* 1977, S.N. 1977, c.64, s.68; *The Labour Relations Act*, S.M. 1972, c.75, s.11 & 13; *The Labour Relations Act*, R.S.O. 1970, c.232, s.119. The absence of earlier case law and the somewhat oblique references to employer lockout activity in various labour law statutes merit a full analysis of the complainant's position.

16. We begin by observing that an employer may properly decide to continue his operations in the face of a strike and, to that end, may hire fresh employees. Section 64 of the Act would appear to contemplate that possibility in that it explicitly provides for the job security of striking employees for a finite period. Commentary supporting this view can also be found at pages 37, 38 and 87 in the Rand Report (*Royal Commission Inquiry into Labour Disputes*, 1968). Reference can also be made to *Ontario Hydro*, [1970] OLRB Rep. Dec. 962 at paragraph 21 where the Board wrote:

We are of the opinion that the union can support the employees who are on strike by creating a strike fund, and the employees may support their position by obtaining employment elsewhere. The employer on the other hand may attempt to buttress its position by arranging to subcontract work, by stockpiling and even by bringing in replacements for striking employees. The employer can seek to have the strikers bear the economic brunt of any work stoppage.

Whether, however, it can be said that employer conduct of this kind is a "statutory right" in the way that an employee's right to strike has been so interpreted (i.e. *CPR v. Zambri* (1962), 34 DLR (2d) 654) is another matter and a matter that we need not decide in the instant case. Westrock is a respondent and it only had to demonstrate that its conduct was proper and not in violation of the statute.

17. Thus, as long as an employer's motive is free of anti-union animus, it seems clear that strike replacement employees can be hired and such action can be a powerful economic weapon in many cases. See the discussion on strike replacements in *Becker Milk Company Ltd.*, [1977] OLRB Rep. Dec. 797 and *Fotomat Canada Limited*, *supra*. This being clear, it is of some interest to note the almost parallel treatment of strike and lockout activity by the statute - a treatment that tends to suggest that, for the most part, they are but two sides of the same coin. For example, section 1(2) provides, *inter alia*, that no person shall cease to be an employee by reason only of his ceasing to work for his employer as the result of a lockout or strike. Similar dual references can be found in, *inter alia*, section 34b, 34d, 34e, 36, 53(3), 63, sections 65 and 66 when read together, 67, 68, sections 82 and 83 when read together, sections 119 and 134a. Indeed, section 64 is the only section of consequence where the dual reference is missing although our later analysis of the lockout replacement capacity of an employer will illustrate why we do not think this discloses a fundamental flaw in the statutory scheme. This parallel treatment, we think, goes some way to suggest that the Legislature saw each party in collective bargaining having a range of economic weapons in its arsenal and that it intended no ground rules with respect to the utilization of such weapons or the initiation of industrial



conflict. The legislative scheme, on this latter point, clearly envisages the possibility of an employer locking out his employees before being struck. For a contrary approach, however, see *The School Boards and Teachers Collective Negotiations Act, 1975*, s.o. 1975, c.72, s.69.

18. The union has argued that the lockout itself was unlawful but, for the reasons above, Westroc was entitled to initiate industrial conflict provided its motivation was free of anti-union animus as was not the case in *Irving Oil, Ltd. v. Oil, Chemical, and Atomic Workers International Union Local 9-69*, *supra*. On the facts before us, we are satisfied that the lockout was free of such mala fides. The bargaining relationship is a longstanding one. The company was concerned about a potential Canada-wide bargaining strategy on the part of the union. The company was particularly concerned over any attempt by the union to link Montreal and Toronto negotiations. The union had struck two years earlier without any notice. The company was genuinely concerned over the progress of the negotiations and the local bargaining committee's lack of responsiveness. Moreover, while a lockout singles out those persons employed by an employer who are engaging in collective bargaining, the statute explicitly recognizes this result and makes a distinction between two classes of employer motivation in causing a lockout. Section 1(1)(i) of the Act defines a lockout as including:

the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees;

A timely lockout aimed at including employee agreement over terms and conditions of employment is part of the very process of collective bargaining which the Act contemplates. See section 63(2) in the light sections of 14 and 45. On the other hand, a lockout aimed at dissuading employees from exercising rights under the Act is never lawful and the concept of timeliness simply has no application to such activity. See *Irving Oil Ltd.*, *supra*, and see also *Ralph Milrod Metal Products Ltd.*, [1977] OLRB Rep. Feb. 79, *Oakwood Hotel (Toronto) Limited*, [1977] OLRB Rep. Aug. 531. A collective bargaining lockout, then, while in some real sense discriminating between those engaged in negotiations and those employees who are not, does not contravene sections 56, 58 or even section 61 because the employer's intent is directed at achieving a collective agreement and not at penalizing his employees for having exercised a right under the statute. Unlawful intent is the hallmark of these sections and a close analysis of the evidence before us in this case discloses no such motivation. As the United States Supreme Court observed in *American Shipbuilding co. v. NLRB*, *supra*, at pp. 2675-6, "[t]he lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." We also refuse to hold that the employer was obligated to terminate the lockout once the Montreal plant settled. The employer's concern for the Montreal situation was not the sole justification for imposing the lockout. Rather, it was simply additional evidence of a good faith intent. Employers can lockout to apply economic pressure in order to achieve a collective agreement on the terms they want and, in the instant case, the employer continued to be driven by this purpose. There is also no evidence that the lockout was intended as a "cheap layoff" or in any way unrelated to



the bargaining differences between the parties. We also note that throughout the lockout the respondent has respected the exclusive authority of the complainant as bargaining agent.

19. Does this analysis change if the employer, after locking out his employees, goes on to replace them in order to operate? Clearly if the employer's motive is directed at avoiding a collective agreement or the punishment of his employees for having exercised rights under the Act, the hiring of replacements should be struck down. In fact, this Board has held that the permanent replacement of an employee does not constitute a lockout because there is nothing conditional in the employer's action. See *Doral Construction Limited*, [1980] OLRB Rep. March 310 and *Rondar Services Limited*, [1977] OLRB Rep. Oct. 655. The action is, instead, a dismissal or termination. The permanent replacement of locked out employees would likely amount to a unilateral destruction of the bargaining unit and the withdrawal of recognition of their duly certified bargaining agent. See *Johns-Manville Products Corporation* (1976), 92 LRRM 1103 (NLRB). This is the feature of a lockout that makes reference to it in section 64 necessary. A permanent lockout of bargaining unit employees would be very difficult to characterize as employer conduct aimed at achieving a collective agreement. But in the instant case, the company clearly hired temporary replacements and paid them at rates found in the expired collective agreement. Full benefit entitlement was not extended to these persons and formal recruitment procedures were not employed. The arrangement was therefore clearly temporary and locked out employees as a group can have their jobs back at any time their bargaining agent is prepared to agree with the respondent.

20. Explicit support for this analysis can be found in the statute itself, where at least one section seems to contemplate the possible hiring of lockout replacements. Section 119(2) and (3) dealing with bargaining in an accredited employer's organization context provides:

(2) No trade union or council of trade unions that has bargaining rights for employees of employers represented by an accredited employer's organization and no such employer or person acting on behalf of the employer, trade union or council of trade unions shall, so long as the accredited employers' organization continues to be entitled to represent the employers in a unit of employers, enter into any agreement or understanding, oral or written, that provides for the supply of employees during a legal strike or lock-out, and if any such agreement or understanding is entered into it is void and no such trade union or council of trade unions or persons shall supply such employees to the employer.

(3) Nothing in this Act prohibits an employer, represented by an accredited employers' organization, from continuing or attempting to continue his operations during a strike or lock-out involving employees of employers represented by the accredited employer's organization.

21. Counsel for the trade union submits that any form of replacement is unlawful because of the manifest distinction made between unionized employees and other workers, but this ignores the fact that the use of temporary replacements is only marginally more discriminatory than the lockout itself and clearly, in the facts at hand, had the same collective bargaining purpose. Indeed, the temporary replacement of locked out employees may allow an employer to maintain key customers (as was part of the employer's motivation in the case at bar) and, to some degree, ensure that locked employees will have jobs to return to. But more

fundamentally, the trade union's position is totally at odds with the dynamics of collective bargaining and, if adopted, would permit trade unions to control the timing of economic conflict - the latter being an inestimable strategic advantage and one nowhere explicitly sanctioned in the statute. See more generally, Summers, *Labour Law in The Supreme Court* (1965), 74 Yale L.J. 59 at page 68.

22. In approaching this aspect of our analysis, an important attitude of the Board expressed in the *Ontario Hydro* case cited earlier, is worth reproducing. Dealing with a somewhat similar problem, the Board in that case at paragraph 15 observed:

In assessing the economic weapons available the Board must be cautious that it does not become the arbiter as to the parties choice of economic weapons; nor is it for the Board to attempt to equalize the economic power available to the parties. The Board's only concern is to determine whether the activities of the parties exceed the bounds of permissible activity so as to contravene the provisions of *The Labour Relations Act*.

The union's recommended approach would lead this Board into a quagmire of interest arbitration over the economic weaponry available to parties as the American cases so vividly illustrate. What if a number of employers are bargaining on a joint basis (as in the *Ottawa Journal* case) and the trade union singles out one of the employers for strike activity? In order to maintain a common front, the remaining employers will be motivated to lockout their employees, but on the complainant's approach only the struck employer could continue to operate at the competitive disadvantage of the very employers who had acted in his defense. This was the first situation in the United States which resulted in the approval of hiring lockout replacements. See *NLRB v. Brown*, *supra*. Unfortunately, however, once one exception is made, it is difficult to see how any kind of a per se rule can prevail. What if an employer utilizes only non-unit personnel to replace locked out employees? Clearly the act of using them to replace locked out employees is not more discriminatory than the initial imposition of the selective lockout. Or what if the lockout is in self-defence to a slow-down or partial strike of bargaining unit employees? The complainant's approach would require employers to tolerate such employee action until a full scale strike is mounted if they wished the option of operating during the duration of economic conflict. Often the difference between a lockout and a strike can be a couple of hours or days and yet the distinction between the two actions urged on this Board could, in many instances, be fundamental. Under such ground rules, one would not be surprised to see trade unions attempting to "pre-empt" announced lockouts by immediate strike activity before the actual implementation of the lockout. And vice versa, potentially. What about conduct that at times is every bit as effective as hiring replacement employees? For example, the filling of orders by other plants or the subcontracting of bargaining unit work to another employer. If the Board began to regulate the choice of economic weapons in these situations, it would come to have a profound impact upon the substantial terms on which the parties contract and an impact nowhere contemplated in the statute. See *Journal Publishing Company of Ottawa*, [1977] OLRB Rep. June 309; *Radio Shack*, [1979] OLRB Rep. Dec. 1220 at paragraphs 122 and 123.

23. It is our view that these kinds of problems have driven the National Labour Relations Board away from the per se unfair labour practice approach in relation to the single employer lockout with replacements articulated in *Inland Trucking Co.*, *supra*, to the much more pragmatic approach, primarily based on established anti-union motive, more recently



adopted by that Board in *Ottawa Silica Company*, *supra*; *Inter Collegiate Press*, *supra*; *Ozark Steel Fabricators*, *supra*; *Sargent-Welch Scientific Co.*, *supra*; and *Johns-Manville Products Corporation*, *supra*. See also *Advice Memoranda of NLRB General Counsel* (1980), 104 LRRM 1167; Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain* (1961), 28 U. Chi. L.Rev. 614; Oberer, *Lockouts and the Law: The Importance of American Shipbuilding and Brown* (1966), 51 Cornell L.Q. 193; Bernhardt, *Lockouts: An Analysis of Board and Court Decisions Since Brown and American Ship* (1971-72), 57 Cornell L.Rev. 211; Note, *Employers' Lockout with Temporary Replacements Is An Unfair Labour Practice [Inland Trucking]* (1972), 85 Harv. L.Rev. 680; but see Feldesman and Koretz, *Lockouts* (1966), 46 Boston U.L.Rev. 329.

24. For the same reasons that we have found the lockout itself to be lawful, therefore, we find the respondent's use of temporary lockout replacements; its deployments of non-unit personnel; and its subcontracting of bargaining unit work, do not violate any provision of *The Labour Relations Act*. The initial use of supervisors, clerical employees and subcontractors was aimed at protecting the patronage of key customers against its two major competitors who had substantial excess capacity. The use of temporary replacements was similarly motivated and implemented only after a lengthy lockout and a resulting perception by the employer of the trade union's unresponsiveness. A distinction made by an employer between employees engaged in protected activity and others who are not is, standing alone, sufficient to violate sections 56, 58 or 61. Rather, the basis to an impugned distinction has to be one of hostile purpose aimed at punishing employees or persons for having exercised their rights under the Act. As the definition of lockout reveals, this labour relations concept involves employer conduct that may be based on a proper or improper purpose. Which purpose is in fact the case must be determined on a careful review of all the evidence. In many earlier decisions we have said that first agreement situations are to be subjected to detailed scrutiny by this Board and a lockout with replacements will particularly merit such an approach in a first agreement context. However, in the instant case, the parties have had a longstanding relationship and there is simply no hint of anti-union animus on the evidence before us.

25. This brings us to the respondent's retabing of proposals. As the Board recognized in the case of *Pine Ridge District Health Unit*, [1977] OLRB Rep. Feb. 65, the possibility of a party to bargaining "changing its mind" is necessarily present in any bargaining situation:-

"Collective bargaining does not take place in a vacuum or in a period where time and events are frozen. Generally, as in this case, it occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another and so wish to change its position at the bargaining table. The party outside cannot be taken to be unaware of the increasing likelihood of that happening with the passing of each successive day and week. The old caution, "Take it before I change my mind" reflects a widely accepted bargaining precept that has its proper application in collective bargaining and in our view, is applicable in the instant case."

The Board has also made it clear that the "fluid backdrop of events" can include a strike or a lockout, so that there is nothing inherently wrong with a party adopting a revised position as a result of (for example) losses suffered because of a strike or lockout. Thus, in *The Toronto Jewellery Manufacturers' Association*, [1979] OLRB Rep. July 719, the Board said "it would



be naive in the extreme for parties to collective bargaining to expect that conditions which prevailed before a strike to still prevail afterwards [sic]." The general position of the Board begins with the proposition (as expressed in *DeVilbiss (Canada) Ltd.*, [1976] OLRB Rep. March 49) that "the parties are best able to fashion the law which is to govern the workplace and that the terms of an agreement are most acceptable when the parties who live under them have played the primary role in their enactment."

26. In the facts at hand, both parties reserved their right to alter their positions and agreed to language which was made specifically subject to a final agreement. The complainant changed or added to its position (on COLA, the insurance carrier and in relation to pensioners) during the negotiations. Since April 24, 1980 when the proposals in question were agreed to, the respondent had failed to achieve any early collective agreement; the wallboard industry had become depressed and the heavy summer activity had not materialized; the lockout had not produced the desired effect on the trade union; and the costly lockout negotiations continued to drag. Under such conditions, it simply cannot be said that the respondent's purpose in tabling new proposals was aimed at avoiding a collective agreement or was unreasonable in the circumstances. We have often noted that the content of the bargaining duty changes with the passage of time. We have also observed that the more enduring a bargaining relationship the more cautious this Board should be in assessing bargaining conduct. See *Radio Shack*, [1979] OLRB Rep. Dec. 1220 at paragraph 69. Both of these principles have application in the facts at hand and provide further incentive to us to find that at no time during the negotiations has the respondent breached its duty under section 14 and, more specifically, its retabling of items on August 28, 1980 did not violate this section.

27. Lastly, regardless of the outcome of these negotiations, we are satisfied that individual employees locked out and replaced by temporary employees continue to have important job security rights under the general unfair labour practice provisions of the statute. After the imposition of a lockout for some considerable duration and without a collective agreement materializing, affected employees may wish to abandon the conflict and return to work despite the apparent continuing resistance of the bargaining agent. The employer's response to such a situation would be closely scrutinized under section 58, *inter alia*, of the Act. However, at present, such rights are not in issue between the parties.

28. For all of these reasons the matters consolidated herein are dismissed.

#### **DECISION OF BOARD MEMBER OLIVER HODGES;**

1. With a few exceptions I agree that the facts are as found by the majority.

2. It is my opinion that a lockout is unlawful when replacement employees are assigned to do the jobs of those locked out. Whether these replacements are non-bargaining unit employees or new hires makes no difference. Lockout replacements displace regular bargaining unit employees who wish to continue working at their jobs. The employer can lawfully lockout only when bargaining unit jobs are vacated and remain vacant for the duration of the lockout. It is my finding that this lockout is unlawful and a violation of s. 56, 58 and 61 of the Act.

3. I further find the employer in violation of s.14 of the Act for declaring a lockout

before the union membership had been given an opportunity to ratify the complete company offer for renewal of the collective agreement. Exhibit 20, the July 14, 1980 company proposal, states:

“Compensation: 3...This wage increase will be retroactive for all hours worked from April 1, 1980 providing ratification of the agreement takes place on or before *July 31, 1980*.”

The first and second page of this company proposal wherein the above caveat is written bears the typewritten date of *July 14, 1980*. The document consists of fourteen pages and includes agreed upon language accepted by the parties. This, however, was not the complete and final company offer. Mr. Barnes told the union bargaining committee when delivering the company proposal on July 14, 1980 that “the company is flexible on wages and benefits.”

4. Questioned in cross-examination, Mr. Barnes admitted that while the *decision* to lockout followed the July 14, 1980 meeting of the parties, a lockout was considered as a possibility for a week or two prior to July 14, 1980. Mr. Barnes said the lockout was a collective decision by himself, management and sales people.

5. The union bargaining committee advised the company at the July 14 meeting that a strike vote had not been taken and that a strike was not intended.

6. Absent the lockout, the union bargaining committee may well have decided to take a total company offer to the membership by July 31 in consideration of four months retroactivity and whatever more in money and benefits were being withheld. The company did not give the union that offered opportunity and as a consequence did not “bargain in good faith and make every reasonable effort to make a collective agreement.”

7. Retabling settled bargaining issues in these circumstances, concurrent with the lockout, further emphasizes the intention of the company to avoid a settlement.

8. The remedies requested by the applicant in these consolidated matters are appropriate, and I so find.

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**1275-79-R; 1391-79-R** Ontario Taxi Association 1688 Canadian Labour Congress, Applicant, v. **Windsor Airline Limousine Services Limited** carrying on business as Veteran Cab Company, Respondent, v. Group of Employees, Objectors.

**Employee – Employer – Section 7a – Whether owner-operators dependent contractors – Board not excluding owner-operators who are employers in form only – Whether drivers employees of respondent or of owner-operators – Board reviewing and applying criteria – Whether applicant having adequate support for certification without vote**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members W. G. Donnelly and W. F. Rutherford.

**APPEARANCES:** *Jeffrey Egner for the applicant; Michael Clark and George King for the respondent; on one appearing for the objectors.*

**DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; March 16, 1981**

1. The Board hereby directs that the above applications be and the same are hereby consolidated.
2. There are two applications for certification before the Board in this matter. In one application the applicant seeks bargaining rights for a unit for all owner-operators who own and operate a single car under the name of the respondent (hereinafter referred to as Veteran Cab Company). The second application is in respect of the drivers of taxi cabs owned either by owner-operators or others and operating under the name of the respondent. For the purposes of this decision the two groups will be separately referred to as “owner-operators” and “drivers”.
3. An extensive history of litigation between the parties precedes the resolution of these applications. In the fall of 1979 the applicant commenced to organize drivers, owner-operators and dispatchers associated with Veteran Cab Company. Three separate certification applications were filed in September and October of 1979. The campaign also gave rise, at the outset, to three section 79 complaints. On the hearing of the application for certification of the dispatchers the respondent challenged the Board’s constitutional jurisdiction in respect of its labour relations, maintaining that it was a federal undertaking. By an oral decision with reasons to follow (see *Windsor Airline Limousine Services Ltd.*, [1980] OLRB Rep. Feb. 272) the Board found, on November 16, 1979 that the respondent was not a federal undertaking within the meaning of section 92(10)(a) of *The B.N.A. Act* and granted interim certification in respect of the dispatchers. In separate decisions dated February 12, 1980 the Board reserved on the applications respecting the owner-operators and drivers pending an examiners’ report and argument both on their status as employees and a final determination of the bargaining unit.
4. At the hearing the applicant adopted the position that the owner-operators and the drivers were dependent contractors within the meaning of section 1(1)(ga) of *The Labour Relations Act* and that therefore they were employees under the Act by virtue of section 1(1)(gb). These sections of the Act provide:



1.(1) (ga) “dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

(ga) “employee” includes a dependent contractor;

5. The applicant invoked the provisions of section 7a of the Act. In its two decisions herein dated February 12, 1980 the Board found that the respondent had breached the Act in such a way as to deprive the employees of the ability to freely express their choice about union representation. The Board reserved on the third element of section 7a, namely whether the applicant has support among the employees sufficient for the purposes of collective bargaining, pending a final determination of the size and composition of the bargaining unit or units. One other issue remaining outstanding, respecting the employment status of Oliver Holden, an owner-operator.

6. We deal firstly with the employment status of owner-operators and drivers. To resolve those issues it is necessary to review in some detail the scope of Veteran Cab Company’s operations. The parties were agreed that the evidence of owner-operator Mark Dempsey is representative of all single car owner-operators. It should perhaps be noted that in light of the decisions of the Board in *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806 and *Dominion Dairies Ltd.*, [1978] OLRB Rep. Dec. 1083 the applicant did not seek to include in the bargaining unit owner-operators who operate more than one vehicle.

7. Mr. Dempsey owns a taxi which he drives under the name of the respondent Veteran Cab Company in the City of Windsor. He drives his cab for five eight hour shifts per week and obtains the assistance of a driver to operate the vehicle at other times. Some 95% of his fares are obtained through the respondent’s radio dispatching facilities.

8. The ownership of the cab is central to the relationship between the respondent and its own-operators. The evidence establishes that the company initially buys the car, financing its purchase by itself borrowing from a financial institution. By an unwritten agreement it then sells the car to an owner-operator, passing on both the purchase price and the financing charges to the owner-operator, with further interest charged to him by Veteran Cab Company on both amounts.

9. To safeguard its loan to the owner-operator the respondent retains legal title to the vehicle. Should the owner-operator fall in arrears in his payments to the respondent it has the discretion to repossess the car, which it apparently does without legal process. The car may then be “sold” again on similar terms to another owner-operator. Cars may be transferred from one owner-operator to another, but such arrangements can be made only with the approval of the company.

10. For example, Mr. Dempsey purchased his car from the company. Apparently it was

previously owned by four different owner-operators of Veteran Cab Company. He bought it for a purchase price of \$4,100. His down payment of \$300 coupled with weekly payments of \$50 for 24 months bring the total cost to him to \$5,800.00. After seven months of operation Dempsey remained indebted to the respondent in the amount of \$4,000. The union submits that the secured financial arrangement between the respondent and its owner-operators is so onerous that ownership is more a matter of form than substance. Counsel for the respondent concedes that the financial terms may be stringent, but submits that these arrangements are nevertheless to the benefit of the owner-operators whose credit rating normally would not allow them to obtain their own bank financing.

11. The owner-operator has other ties and obligations to the company. The municipal cab license on an owner-operator's car is held by the respondent. All cars operating under the respondent must bear the decals and colours of Veteran Cab Company and must be equipped with a company meter. In addition to his finance payments, Mr. Dempsey must pay the respondent a stand rental of \$68.50 per week and \$50.50 per week for mandatory insurance on his vehicle, apparently purchased by the respondent. In addition he incurs weekly expenses of approximately \$45 for gas, \$10 for car washes and has an average weekly maintenance and repair bill of \$30. Given his total financial obligations to the respondent, to make money Mr. Dempsey is required to have his car on the road more than eight hours a day. An eight hour shift produces an average total revenue of \$60.00. In a five day week an owner-operator's gross earning on that basis would be \$300.00. After his weekly overhead of \$254.00 is paid, he is left with \$47.00. Mr. Dempsey therefore finds it necessary to use the services of a driver. So that owner-operators can earn revenue for more hours than they can drive, the company operates an informal driver brokerage, known as the "bakery lot". Drivers who have been trained, tested and approved by the company can present themselves there on a daily basis and be assigned an owner-operator's car to drive.

12. An owner-operator can also make his own arrangement with a driver on a more permanent basis. But the driver thus obtained, like the driver from the bakery lot, must first meet a number of conditions established by Veteran Cab Company.

13. In the employment of Veteran Cab Company there are supervisory personnel who perform a screening process designed to select the most eligible drivers and owner-operators from applications. To qualify for consideration the applicant must provide proof of a valid Province of Ontario driver's license and a City of Windsor taxi permit. Prospective owner-operators are not required to demonstrate that they can obtain the special license plate for the taxi itself. Applicants who meet the minimum conditions set out above are then put through a training program. In this program instructions are given in the use of zone maps and two-way radios. As well, the rules governing the operation of vehicles on duty are explained and the applicant's knowledge of the city's roads is measured. Satisfactory completion of this program nets the applicant the company's authorization to operate a taxi under the name of Veteran Cab Company as either a driver or an owner-operator.

14. This authorization is revocable by the company without notice. Drivers and owner-operators alike must abide by certain rules or face possible dismissal. They must report on the air at the start of a shift and keep the respondent's dispatchers accurately advised of their posting or zone location. They must adhere to the company's rules as to the cleanliness of vehicles and its standards of dress and personal appearance. The company's rules are enforced by supervisors who drive the streets in an unmarked car to observe the owner-operators and

drivers at work. Both owner-operators and drivers are required to have identification cards issued by the respondent renewable every 3 months.

15. Infractions of the company's rules can result in discipline being imposed on an owner-operator or a driver. Sanctions range from discharge to a partial withdrawal of privileges. One event is particularly illustrative of the extent of the company's disciplinary authority. It involves a driver who, while under the influence of alcohol, was caught using obscene language on the radio frequency used by his fellow drivers. This driver was summoned into the office and given the option of either being dismissed or undertaking to report to the office at the end of each working day after the staff had left for the purposes of sweeping the floors. He opted for the latter. Others have been released for repeated minor accidents. Another was suspended for not getting a haircut. Perhaps the most rigidly adhered to rule is the one requiring a driver to accept the dispatcher's posting. Apart from trips to grocery stores and to Detroit (for which a driver can obtain an absolute right to refuse so long as he refuses all such trips) a driver is under a duty to accept any trip posted for him by the dispatcher. A concomitant provision is that if, in an effort to avoid a low return short run, a driver claims he is no longer in a particular zone when he is in fact in that zone he is liable to immediate suspension upon detection.

16. At the hearing the company argued that it was merely enforcing the rules of a committee of owner-operators. This committee was disbanded some years ago; at the time that this application was made the company was the only rule generating force. On the basis of this evidence, and upon our understanding of the necessity of these rules to the respondent's operation, we conclude the respondent has adopted these rules as its own.

17. A further factor relevant to the issue of employee status is the working relationship between the owner-operators and the drivers. As the Board has noted, they are brought together by the fact that an owner-operator will not make a reasonable living unless he has someone else to drive the car he is paying for and a driver will not make any money unless he has a vehicle to drive. Few elements of their working relationship are outside Veteran Cab Company's control. An owner operator is free to choose which of the available approved drivers he will work with. However he cannot compel a particular driver to drive his vehicle. Neither can he suspend the driver or dismiss him from driving elsewhere within the respondent's organization. If his driver is pulled off the road for a violation of a company rule the owner-operator will not be invited to participate in discussions regarding the discipline to be meted out, even though the loss of a particularly productive driver could significantly affect the owner-operator's income.

18. The economic relationship between the owner-operator and his driver is simple. They agree between themselves on a split of the revenue generated by the driver. The reality of the industry, however, is that there is little real negotiation on this point. Almost without exception the owner and the driver will opt either for a sixty-forty share of revenue or a fifty-fifty split. Occasionally they may agree on a flat fee. When a driver is assigned a car through the bakery lot the company simply administers the owner's instructions in that regard.

19. In light of the foregoing evidence we turn to determine whether the owner-operators are dependent contractors within the meaning of the Act. A related issue is whether the drivers, on the other hand, are employees of the respondent or employees of the owner-operators.



20. We deal firstly with the owner-operators. As was stated in *Dufferin Aggregates*, [1978] OLRB Rep. Mar. 278:

The Board must examine all of the facts that describe the terms and conditions under which the owner-driver works with a view to determining whether he and the party that has the benefit of his services are in such a relationship as to give rise to a de facto obligation to perform duties because of an evolved economic dependence. The question is whether the overall relationship more approximates the bond between employer and employee than the kind of association normally found where services are provided by an independent contractor.

21. As a guideline for the identification of the extent of economic dependence required by the statute this Board has adopted the test set out in *Midland Superior Express Ltd.* (1974), 4 di 30 where the Canada Labour Relations Board wrote:

Surely the test of control to be applied now to the dependency is of an economic nature. Are the persons involved obliged to sell their services in a market in which they are economically dependent on a single or a restricted few purchasers? Is their freedom to contract with any degree of independence so thwarted that they are in fact in a status equivalent to that of individual employees faced by powerful employers? One can envisage situations in which a person who would be completely independent from any employer-employee relationship in the common law contractual sense and yet would be absolutely dependent in such an economic sense.

22. A number of Board decisions have dealt with the employment status of persons who work in the taxi industry (*Seven-Eleven Taxi Ltd.*, [1976] OLRB Rep. Apr. 134; *Blue Line Taxi Co. Limited*, [1979] OLRB Rep. Nov. 1056; *Niagra Veteran Taxi*, [1980] OLRB Rep. Mar. 337). The respondent Veteran Cab Company sought to establish that this case was similar to the *Seven-Eleven Taxi Ltd.* case where owner-operators were not found to be dependent contractors. However, significant differences as to the extent of control exercised by the respective taxi companies prevent the Board from following the *Seven-Eleven Taxi Ltd.* in this case. One example is illustrative. As has been noted a driver's or owner-operator's failure to accept a posting from Veteran Cab Company when in fact he was available for that posting renders him liable to immediate suspension and, possible, dismissal. He can be taken off the road for an indefinite period of time which effectively strips him of income. However, from the decision in *Seven-Eleven Taxi Ltd.*, *supra*, it would appear that a driver of owner-operator would be entitled to a hearing and, if he was found to have refused to take a fare, would only be liable for a three day suspension "off the air" at most. This would not prevent the person suspended from taking a Seven-Eleven cab out to secure fares off the street. Further important differences between the control exercised by *Veteran Cab Company* and the control exercised in *Seven-Eleven Taxi Ltd.* include the fact exercised by *Veteran Cab Company* and the control exercised in *Seven-Eleven Taxi Ltd.* include the fact that the latter company did not have a right to approve of the drivers used by an owner-operator and did not have a prescribed set of rules similar to those found in this case. For these reasons we find *Seven-Eleven Taxi Ltd.* to be of little assistance.

23. The respondent submits that the owner-operators are entrepreneurs. In essence,

this claim denies the existence of any dependence. On the evidence we cannot accept this view. Like the owner-operators in *Niagra Veteran Taxi, supra*, these owner-operators are dependent for their livelihood on the goodwill developed by the company and not by themselves. By strictly controlling their access to this goodwill through a financing arrangement in respect of which they have no real choice and working conditions that involve an extensive code of rules *Veteran Cab Company* has put the owner-operators in a position of economic dependence giving rise to a *de facto* obligation to perform duties in a relationship more closely resembling that of an employee than an independent contractor.

24. In the alternative the respondent argues that the owner-operators must be excluded from the protections of the Act because they are employers. The following passage from *Canada Crushed Stone* (at p. 812) was cited:

The Board takes the view that the line must be drawn so as to exclude from the operation of the Act those contractors who, although economically dependent, are themselves employers deriving income from the labour of others.

25. We note, however, that in the same decision (at p. 813) the above exclusionary rule is qualified so as

to exclude only dependent contractors who are employers in substance as well as form . . . A dependent contractor with the authority to hire, fire, discipline, and set terms and conditions of employment in respect of others is not a dependent contractor entitled to the benefits and protections of *The Labour Relations Act*.

26. In the instant case it is clear that the owner-operators are employers in form only. The meaningful lines of accountability run from the drivers to the respondent, and not to the owner-operator. For example, in one incident related to the Board an owner-operator discontinued the payment of his driver's \$5 weekly insurance fee when he was told that the company could not give him a receipt for the sum because it was not his responsibility to make the payment. On the evidence few elements of the working relationship between owner-operator and driver remain outside the scope of *Veteran Cab Company's* authority. Moreover, what little is left to be set by the owner-operator and his driver, namely the percentage of split of the fares and the hours to be worked, is determined in large part by the unremarkable nature of the exchange. The driving of a taxi cab and the provision of a cab for driving are not so unique a skill and opportunity as to cause a great deal of bargaining over terms. In the final analysis, the arrangement between the owner-operator and the driver is very much circumscribed by their economic conditions and by the fact that they are both dependent on providing services in a system closely controlled by the respondent and designed to channel the ultimate financial benefit into its hands.

27. If it were necessary to conclude, as for reasons elaborated below we expressly do not, that the drivers are employees of the owner-operators of single cars, that would not of itself preclude the owner-operators from falling within the definition of "dependent contractors" within the meaning of the Act. The Board has noted that when a contractor employs others in such a way as to himself become an entrepreneur in the sense that he substantially profits for the labour of others he may fall outside the scope of section 1(1)(ga) of

the Act. (*Canada Crushed Stone, supra.*) When, however, a contractor who is otherwise dependent makes use of a helper as an integral part of making the best use of his equipment to earn his living, he does not by that fact alone become an entrepreneur to be excluded from the protection of the Act. (*Dominion Dairies, supra; Comfort Guard Services*, [1978] OLRB Rep. Oct. 905.)

28. In the instant case the owner-operator with a single car uses a driver not as a means of expanding a personal business, but rather as the only apparent way to make ends meet within the respondent's operations. A multiple cab owner with no indebtedness to the respondent profiting from the work of a number of drivers might arguably be an employer precluded from collective bargaining for the reasons elaborated in *Canada Crushed Stone*. The single car owners in this case however, clearly do not come within that capacity. Their use of a driver springs from financial necessity. Therefore if the owner-operators were found to be employers of the drivers of their car, they would not on that basis be excluded from the category of dependent contractor.

29. Having regard to the totality of their relationship with Veteran Cab Company we must conclude that the owner-operators are dependent contractors within the meaning of the Act. Their financial obligation to the respondent through its legal ownership of their cars, its effective control of their access to work by association with its taxi licences and its goodwill, and the controlled conditions under which they work combine to create a relationship more like that of employer and employee than client and contractor.

30. We turn to consider separately the employment status of the drivers. Who, as between the owner-operators and the respondent, is their employment for the purposes of the Act? In a system of complex economic relationships there is nothing unusual about a fact situation that calls into question the identity of the true employer. That issue has been addressed in a number of previous Board decisions. The factors to be considered and principles to be applied in answering that question were exhaustively canvassed in *York Condominium Corporation* [1977] OLRB Rep. Oct. 645 and *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538.

31. Seven criteria to determine the seat of employment authority were listed in *York Condominium* (at p. 645) and *Sutton Place* (at p. 1545):

- (1) The party exercising direction and control over the employees performing the work. See the *Municipality of Metropolitan Toronto* case, 61 CLLC ¶16,214; the *Sentry Department Stores Limited* case, [1968] OLRB Rep. Sept. 540; 546; the *Beer Precast Concrete Limited* case, [1970] OLRB Rep. May 224, 227-8; the *Belcourt Construction (Ottawa) Limited* case, [1971] OLRB Rep. June 321, 324; and the *Reid's Holdings (Belleville) Limited* case, [1972] OLRB Rep. July 753, 761.
- (2) The party bearing the burden of remuneration. See the *Municipality of Metropolitan Toronto* case, *supra*; the *Goldlist Construction Limited* case, [1966] OLRB Rep. Oct. 487; 488; the *Kel Truck Services Ltd.* case, 1972 CLLC ¶16,068; and the *Templet Services* case, [1974] OLRB Rep. Sept. 606.



- (3) The party imposing discipline. - See the *Reid's Holdings (Belleville) Limited* case, *supra*; and the *Templet Services* case, *supra*.
- (4) The party hiring the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Sentry Department Stores Limited* case, *supra*; and the *Reid's Holdings (Belleville) Limited* case, *supra*.
- (5) The party with the authority to dismiss the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; and the *Templet Services* case, *supra*.
- (6) The party which is perceived to be the employer by the employees. - See the *Sentry Department Stores Limited* case, *supra*.
- (7) The existence of an intention to create the relationship of employer and employees. - See the *Belcourt Construction (Ottawa) Limited* case, *supra*.

32. The cases have not assigned any order of priority to these factors, and the weight to be given to each must obviously depend upon the facts of each particular case. The fundamental question, however, most frequently is "who exercises fundamental control of the employment relationship?" As the Board commented in *Sutton Place Hotel* at pp. 1552-53:

The weight to be accorded the various indicia of employer status set out in *York Condominium* cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may conclude that they accurately identify the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.

A particularly important question answerable through an evaluation of all of the factors set out in *York Condominium* is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of hiring hall, it may not. In some cases, day-to-day supervision may suggest fundamental control, in others it may not. Similarly with the payment of wages; in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in *York Condominiums* inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a work, to find the seat of fundamental control is generally to find the employer for the purposes of *The Labour Relations Act*.

33. When the foregoing principles are applied to the drivers who work within the respondent's enterprise, there can be little doubt who is the employer for the purposes of the Act. Drivers are recruited by Veteran Taxi. It checks their qualifications, gives them basic orientation and issues them an identification card. It subjects them to an elaborate code of rules which are enforced through its supervisory staff. It assigns them to drive the cars of owner-operators and imposes discipline upon them for breaches of the rules up to and including dismissal, without consultation with the owner-operator.

34. The economic relationship between the owner-operator and the driver is largely limited to agreeing on the split of the revenue generated by the driver or on a flat fee and the hours of work to be covered by each of them. At the end of the shift the driver turns in a trip sheet to the respondent, although on occasion it may be relayed through the owner-operator. He likewise remits his gross earnings less his percentage. The respondent deducts 3% of the remaining gross by way of Unemployment Insurance Premiums and Canada Pension Plan contributions from the owner-operator to cover the driver. It issues a T4 slip to the driver, in the name of the owner-operator, reflecting these deductions.

35. Owner-operators must pay a fixed weekly amount to the respondent to participate in an insurance plan covering their vehicles. That plan is apparently purchased and administered through the company. Drivers are also required to participate separately and must pay a fee of one dollar a day to the respondent for insurance. If they do not, they can't drive no matter what the owner-operator's wishes might be.

36. The respondent's control over the work performed by the driver is maintained by its code of rules and disciplinary supervision. Its control of the driver's income is no less direct. Like the owner-operator, the driver derives income from the name and goodwill of the respondent, from its ownership of vehicles and taxi licences and from the radio dispatched calls which the respondent passes on to them. If the driver fails to perform to the necessary standard he can be taken off the air or off the road. For example, the evidence is that if a supervisor in a patrol car sees a vehicle that is dirty, the radio dispatchers will instruct the driver to have the car washed. Until the car is washed no further calls will be dispatched to that driver.

37. The drivers earn money to the extent that the respondent's business allows them to. It hires them, fires them and controls their day-to-day work in a way that the work of employees is controlled. The ownership of the vehicle by the owner-operator, an ownership that in any event is more a matter of form than of substance, and his or her income splitting arrangement with the driver do not materially alter that reality. The driver is an integral part of an economic structure directed and controlled by the respondent. By keeping the owner-operator's car on the road, adhering to company rules and driving a cab to service the respondent's calls the driver plays an essential part in advancing the respondent's goodwill and its ultimate profits. Like the owner-operator, the driver has no real economic existence apart from the respondent's business organization. Having examined the lines of authority and control within that organization we must conclude that for the purposes of the Act the drivers are employees of the respondent and not of the owner-operators.

38. The final person whose employment status remains to be determined is Oliver Holden whom it is alleged, should be excluded from the bargaining unit because he exercises managerial functions. Mr. Holden has been associated with Veteran Cab Company for some

thirty years as an owner-operator. His testimony before the examiner revealed a considerable loyalty to the company and a firm belief that what one driver does reflects on all drivers. Out of these feelings has arisen a concern on Mr. Holden's part that the rules relating to speeding, car cleanliness and personal hygiene be followed. To this end he has on several occasions encouraged drivers to abide by the rules. However there was no evidence that he at any time was given any special authority or received any compensation for these, and other, "supervisory" services. Absent such evidence there is no need to review the Board's jurisprudence on this issue. Accordingly, the Board finds that Mr. Holden is an employee of the respondent.

39. The parties are agreed that the owner-operators and the drivers should constitute separate bargaining units. The Board therefore finds that all owner-operators employed by the respondent in Windsor, save and except supervisors and persons above the rank of supervisor, constitute a unit of employees appropriate for collective bargaining (hereinafter referred to as bargaining unit #1). For the purposes of clarity the Board notes the agreement of parties that Peter Codarian, John Falk, Ambrose Power and Nelson Vincent are excluded from the bargaining unit.

40. The Board further finds that all drivers employed by the respondent in Windsor, save and except supervisors and persons above the rank of supervisor, constitute a unit of employees appropriate for collective bargaining (hereinafter referred to as bargaining unit #2).

41. We turn to consider whether there is adequate membership support within each of the bargaining units within the meaning of section 7a of the Act. On the date of application there were sixty-four employees in bargaining unit #1. Nineteen of them have indicated their support for the applicant through membership of evidence filed with the Board. The applicant's minimum strength in the bargaining unit is therefore 29.6 per cent. Having regard to the severity of the unfair labour practices found to have been committed by the respondent that a number must be seen as representing a dedicated core of supporters. As the Board stated in its recent decision in *K-Mart Canada Ltd.* [1981] OLRB Rep. Jan. 60:

In approaching its discretion to grant certification under section 7a of the Act the Board must make some prognosis as to the future viability of bargaining. In so doing it does not necessarily view the membership strength which the applicant has on the date of certification as a static and immutable figure. Where the evidence establishes that a work place has been subjected to the chilling effect of unfair labour practices and tend to suppress any expression of pro-union sentiment, it is not unreasonable to expect that the granting of a Board certificate, with or without the assistance of other remedies under *The Labour Relations Act* will in some degree restore the legitimacy of the trade union in the eyes of the employees. The Board therefore takes into account the potential for union support to grow among employees who beforehand might have been afraid to associate themselves with the union. With the granting of a certificate, assuming that all unfair labour practices will end, there is little reason to doubt that the union's base of support will grow and that more and more employees will come forward to participate in the endeavours of their bargaining agent.



In determining whether a union has support adequate for collective bargaining purposes within the meaning of section 7a of the Act the Board's concern is whether there is a number of employees sufficiently representative of the employees in the bargaining unit, with the ability to negotiate with their employer on the content of collective agreement. In this regard bargaining ability is to be distinguished from bargaining power. The question is not whether they can mount a successful strike, or whether they will eventually realize substantial gains at the bargaining table. Rather, it is whether they have the core of support sufficient to negotiate with the employer. A section 7a certificate, like any certificate, is only a beginning and need not be seen as anything more.

(see also, *Skyline Hotels Limited*, [1980] OLRB Rep. Dec. 1811)

42. In this instance the Board is satisfied that the applicant's membership support among the owner-operators is sufficient to permit meaningful and representative bargaining with the respondent. It would not be unreasonable to expect that with unfair labour practices at an end greater numbers of owner-operators will come forward to participate in the efforts of their bargaining agent. A further factor in this case is the support which the union enjoys among the drivers. The fact that in a section 7a application the union has membership support of almost 50 per cent in the drivers' bargaining unit gives it a strong presence in the workplace generally. In those circumstances the nearly 30 per cent of the owner-operators who support the union will not stand alone. They gain considerable support, albeit indirect, from the union's presence among the drivers. In light of these factors the Board is satisfied that the applicant has membership support adequate for the purposes of collective bargaining in bargaining unit #1. A certificate will issue in respect of bargaining unit #1.

43. According to the material filed, on the date of application there were 149 employees in bargaining unit #2. Membership evidence was submitted on behalf of 74 of them. We are satisfied that with membership support of 49 per cent the applicant has adequate support for the purposes collective bargaining. A certificate will issue in respect of bargaining unit #2.

#### **DECISION OF BOARD MEMBER W. G. DONNELLY;**

For reasons already expressed, I do not agree that the Board has jurisdiction to entertain these applications. Subject to that reservation, however, I agree with the decision of the majority on the employment status of the owner-operators and drivers and on the disposition of the applications under section 7a of the Act.

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**1699-80-R** Labourers' International Union of North America, Oil and Gas Technicians, Service, Domestic and General Workers Local 1267, Applicant, v. **WMI Waste Management of Canada Inc.**, Respondent, v. International Union of Operating Engineers, Local 793, Intervener #1 v. Teamsters Local Union No. 419, Warehousemen and Miscellaneous Drivers, affiliated with the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, Intervener #2.

**Abandonment – Bargaining Rights – Certification – Related Employer – Labourers' and Operating Engineers unions filing competing applications for certification – Teamster's union claiming it holds bargaining rights – Whether Teamsters abandoned rights by agreeing to postpone bargaining rights – Board allowing applicants exception to rule that displacing union must take existing unit – Labourers claiming bargaining rights through section 1(4) – Board ordering vote between all three unions**

**BEFORE:** M.G. Picher, Vice-Chairman, and Board Members M.J. Fenwick and F.W. Murray.

**APPEARANCES:** *J.R. McPherson and C.G. Paliare for the applicant; G.J. Weir and J.G. Temple for the respondent; L.C. Arnold and F. Amis for intervener #1; J.J. Nyman and B. Bodkin for intervener #2.*

#### **DECISION OF THE BOARD; March 10, 1981**

1. This is an application for certification filed by the Labourers' International Union of North America, Oil and Gas Technicians, Service, Domestic and General Workers Local 1267, (hereinafter referred to as "the Labourers") for bargaining rights in respect of all employees of the respondent working at and out of its sanitary land fill site at Maple in the County of York. The International Union of Operating Engineers, Local 793 (hereinafter "the Operating Engineers") has filed an application for certification by intervention. The Teamsters Union Local 419 (hereinafter "the Teamsters") has intervened alleging that it holds the bargaining rights applied for by both the Labourers and the Operating Engineers.

2. The facts are not substantially disputed. The respondent is a wholly owned subsidiary of Waste Management Inc., an American corporation with headquarters in Chicago, Illinois. Prior to 1979, the American parent company owned a number of waste disposal companies operating in Ontario. Two of those companies were York Sanitation Co. Ltd. and Disposal Services Limited, doing business in and around Metropolitan Toronto. In 1979, the parent company rationalized its corporate structures in Ontario. By articles of amalgamation effective March 21, 1979, Disposal Services Limited ceased to have a corporate existence and was subsumed into WMI Waste Management of Canada Inc., although the name Disposal Services continued to be used as registered business name. York Sanitation Co. Ltd., continued as a subsidiary of the parent Waste Management Inc. but is now entirely managed by WMI Waste Management Inc. of Canada Inc. It is not seriously challenged that WMI Waste Management of Canada Inc., the respondent in these proceedings, is a transferee of the business of Disposal Services Limited within the meaning of section 55 of the Act and is under common direction and control with York Sanitation Co. Ltd. within the meaning of section 1(4) of the Act.

3. Until 1976, Disposal Services Limited operated a land fill site at Maple. Its employees at that location were represented by the Teamsters pursuant to a certificate of this Board dated January 2, 1973. the bargaining unit in the certificate, and in subsequent collective agreements, included "all employees of Disposal Services Limited in Metropolitan Toronto and at Maple in the Township of Vaughan". In 1976, the Maple site ceased operations. As a practical matter, therefore, the Teamsters' collective agreements, the most recent of which expires on April 1, 1982, have thereafter been administered only in Metropolitan Toronto, where Disposal Services Limited, and now the respondent, continued to operate a yard at Weston and a transfer station on Parliament Street.

4. In July of 1980, the respondent opened a substantial new and sophisticated land fill site at Maple. Upon hearing of the revived operation at Maple, the Teamsters initially endeavoured to sign the employees working at the site into membership. After more closely reviewing the scope clause in their collective agreement they formed the opinion that the bargaining rights for the respondent's employees at Maple were already theirs. When they approached the respondent to assert their rights, they were told the small crew of employees then working at Maple were essentially engaged in site preparation. The respondent's officers also advised them that it was then undergoing considerable stress in a struggle for environmental approval. The respondent did not then deny the Teamsters claim to represent the employees, but asked, in light of the circumstances, whether the Teamsters would wait until July of 1981, when the site was scheduled to open to the public, before asserting their rights. The Teamsters accepted those representations at face value and agreed to forebear asserting their rights until operations at Maple were in full swing in the summer of 1981.

5. Against that background both the Labourers and the Operating Engineers proceeded to conduct membership drives among the employees working at the respondent's new site at Maple. If the Teamsters' rights are not a bar to their applications, each of them would appear to have membership support sufficient for outright certification. In other words, as between the Labourers and the Operating Engineers, the Board would conduct a representation vote among the employees in the bargaining unit.

6. The Teamsters do not oppose a representation vote and do not assert their collective agreement as a bar to either application. They do, however, submit that they should be included on the ballot as the incumbent union whose bargaining rights are being displaced. The Operating Engineers and the Labourers submit that the Teamsters should be viewed by this Board as having abandoned their rights, so as to be precluded from participation in any representations vote.

7. With that assertion, we cannot agree. While the Board does not necessarily endorse the arrangement by which the Teamsters agreed to postpone their bargaining rights, that goes only to the quality of their representation. The uncontroverted evidence is that the Teamsters showed interest in representing the employees at Maple from their first knowledge of the renewed operations. It is also clear from the evidence that they never walked away from their bargaining rights. On the contrary, it is plain that the Teamsters had every intention of asserting their rights in July of 1981, when, according to their understanding, the respondent would first be open for business. In our view, in the circumstances of this case, it would disregard the realities to infer an abandonment from the Teamsters' limited postponement of their bargaining rights with the respondent.



8. The Board accepts the submission of counsel for the Teamsters that the terms of the Teamsters' collective agreement were not intended to apply to the site at Maple, and could not apply to that location without some amendment. By its very language, the schedule respecting wages and job classifications appears to be predicated upon employment at either Weston or Parliament Street. Notwithstanding that the collective agreement might not be applicable, the bargaining rights reflected in its scope clause continue to exist until they are either terminated, displaced or abandoned. None of those things has yet happened. In these circumstances, the applications before the Board must be viewed as displacing subsisting bargaining rights held by the Teamsters. The Teamsters should therefore be on the ballot. (*Evans Lumber and Builders Supply Ltd.* 58 CLLC ¶18,117; *Dominion Bridge Co. Ltd.*, [1970] OLRB Rep. Apr. 201).

9. The Board normally requires a displacement applicant to take all of the employees in the existing bargaining unit reflected in the scope clause of a collective agreement (*Toronto Star Limited*, [1974] OLRB Rep. July 416 at p. 417). That rule is grounded in the Board's natural concern to preserve the integrity and viability of established bargain units. However, the rationale for that rule does not apply in this case, where the integrity of the Teamsters' pre-existing bargaining unit encompassing both Metropolitan Toronto and Maple has eroded to the point where they do not themselves assert it. In the unusual circumstances of this case, therefore, it is appropriate to permit the applicants to contest the bargaining rights of the Teamsters at Maple.

10. The Labourers sought to place their application on the alternative basis that they already hold bargaining rights for the employees by the operating of section 1(4) of the Act. By a certificate of this Board, dated October 30, 1975, the Labourers obtained the bargaining rights for "all employees of York Sanitation Co. Ltd. working in and around Metropolitan Toronto". In subsequent collective agreements, including the current collective agreement between York Sanitation Co. Ltd. and the Labourers, the bargaining unit has become: "all employees of the company working in and around Metropolitan Toronto, the Region of York, County of Simcoe, County of Dufferin, Region of Peel and the Region of Durham". The bargaining rights so defined cover the area that includes the respondent's new operation in Maple. It is common ground that the Labourers have represented employees of York Sanitation Co. Ltd. at a land fill site adjacent both to the new site and to the site abandoned in 1976. Counsel for the Labourers submits that in this situation the Board should exercise its discretion under section 1(4) of the Act to declare that the Labourers' bargaining rights and their collective agreement with York Sanitation Co. Ltd. extend to the respondent's new sanitary land fill site.

11. There is no suggestion that in 1976, or at any time prior, the Labourers attempted to assert their bargaining rights as against Disposal Services Limited on the site which it then operated in Maple, and for which the Teamsters had bargaining rights. Counsel for the Labourers argues that there is no evidence before the Board from which we can conclude that the Labourers were then, or indeed at any time until now, aware of the corporate relationship between the two companies, and submits that we should therefore not decline to exercise our discretion to make a section 1(4) declaration favouring the Labourers.

12. In our view that argument cannot succeed. A party requesting the Board to exercise its discretion to provide the extraordinary benefit of a declaration under section 1(4) has, at the very least, an onus to call affirmative evidence to explain an obvious failure to assert its

rights for a substantial number of years. It is well settled that delay by a union may preclude it from pleading the benefit of section 1(4) of the Act, (*Ellwall & Sons Construction Ltd.*, [1978] OLRB Rep. June 535). Moreover, in any case, the Board should not permit section 1(4) applications to disturb established bargaining structures (*Crown Cork & Seal*, [1978] OLRB Rep. Sept. 809).

13. If we are to find that the Labourers were unaware of the corporate link between Disposal Services Limited and York Sanitation Co. Ltd. as an explanation for their inaction, we should have the best evidence on that issue through direct testimony from the Labourers themselves. No such evidence, or indeed any evidence, was called by the Labourers. We see no reason why the Labourers, having called no evidence should be allowed, by their silence, to force the other parties to in effect disprove a negative.

14. The purpose of section 1(4) is to safeguard established bargaining rights which might otherwise be eroded by corporate structuring. It is not an alternative to certification. (*Industrial Mine Installations Ltd.*, [1972] OLRB Rep. Dec. 1029). To accede to the Labourers' argument would be to allow a union to use section 1(4) not to protect its bargaining rights but to expand them. In this case, there is no suggestion that either the respondent, or Disposal Services Limited before it, were established in such a way to adversely impact on the bargaining rights which the Labourers held with York Sanitation Co. Ltd. On the contrary, it is clear that for years the two companies, albeit related, operated as separate business entities with separate employees represented by two separate unions. The re-opening at this time of operations at Maple by the respondent after a hiatus of several years does not create a fresh situation appropriate for the application of section 1(4). The Labourers should not obtain under section 1(4) what they properly should be required to obtain through certification. (*H. Allaire and Sons Co. Ltd.*, [1974] OLRB Rep. July 457; *Zaph Construction of Canada Ltd.*, [1977] OLRB Rep. Nov. 741). For the foregoing reasons, the Labourers' submission in respect of section 1(4) must be dismissed.

15. The Board finds that all employees of the respondent working at Maple, Ontario, save and except foremen, persons above the rank of foreman, and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

16. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made were members of the applicant on November 18, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. The Board is also satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made were members of intervener #1 on November 18, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof

who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

19. Voters will be asked to indicate whether they wish to be represented by the applicant, intervener #1 or intervener #2 in their employment relations with the respondent.

20. The matter is referred to the Registrar.

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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1981

### BARGAINING AGENTS CERTIFIED DURING FEBRUARY

#### No Vote Conducted

**2250-79-R:** Retail Clerks Union, Local 206 (Applicant) v. Canada Safeway Limited (Respondent).

Unit: "all employees of the respondent at its retail stores in Sault Ste. Marie, Ontario, save and except first assistant store managers, second assistant store managers, persons above the ranks of first assistant store manager and second assistant store manager and persons covered by a subsisting collective agreement." (5 employees in the unite).

**0406-80-R:** Labourers' International Union of North America, Local 183 (Applicant) v. New Generation Homes (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (43 employees in the unit).

**00574-80-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Miore Distributing Co. Limited (Respondent).

Unit: "all employees of the respondent, including dependent contractors, employed in the Municipality of Metropolitan Toronto, save and except foremen and supervisors, persons above the rank of foreman and supervisor, and office staff." (14 employees in the unit).

**0696-80-R:** Ontario Public Service Employees Union (Applicant) v. Madame Vanier Children's Services (Respondent).

Unit #1: "all employees of the respondent at London, Ontario, save and except unit heads, program managers, support services manager, and persons above such ranks; consultants, staff psychiatrists and psychiatric residents; office and clerical employees; security guards; persons regularly employed for not more than 24 hours per week and students regularly employed during the school vacation period. (42 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Unit #2: "all employees of the respondent at London, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except program managers, support services manager and persons above such ranks; consultants, staff psychiatrists and psychiatric residents; office and clerical employees and security guards." (8 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

**0836-80-R:** Labourers' International Union of North America, Local 506 (Applicant) v. H. MacNeil Construction Limited (Respondent) v. General Contractors' Section of the Toronto Construction Association (Intervener).



Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**0958-80-R; 0969-80-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Hulst Town Contracting Ltd. (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in the unit).

Unit #2: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

**1137-80-R:** Labourers' International Union of North America – Local 183 (Applicant) v. Pelar Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

**1138-80-R:** Labourers' International Union of North America – Local 183 (Applicant) v. Mando Contracting Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1229-80-R:** Labourers' International Union of North America – Local 183 (Applicant) v. Colavita Construction Co. Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**1230-80-R:** Labourers' International Union of North America – Local 183 (Applicant) v. Will-Thorn Contr. Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**1231-80-R:** Labourers' International Union of North America – Local 183 (Applicant) v. Sherwood Green Homes Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

**1313-80-R:** Labourers' International Union of North America – Local 183 (Applicant) v. Lancione Contr. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**1596-80-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Gendrain Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**1660-80-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Francis Engineering Limited (Respondent).

Unit: “all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in all other sectors in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, and all carpenters and carpenters' apprentices in all other sectors in the Townships of Elizabethtown, Augusta, and Edwardsburgh and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).



**1728-80-R:** The Labourers' International Union of North America, Local 506 (Applicant) v. Algoma Painting & Decorating Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1784-80-R:** Canadian Union of Public Employees (Applicant) v. South Huron and District Association for the Mentally Retarded (Respondent).

Unit: "all employees of the respondent in Dashwood, save and except managers, persons above the rank of manager, secretary to the executive director, accountant, industrial contracts programme department supervisor, woodworking programme department supervisor, nursery supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (12 employees in the unit). (clarity note).

**1794-80-R:** Labourers' International Union of North America - Local 183 (Applicant) v. Oxville Homes Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**1823-80-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Laurkar Investments Limited, Milbell Investments Limited, Baytze Investments Limited, carrying on business as Armel Management (Respondent).

Unit: "all employees of the respondent engaged in cleaning at Queens Towers 235 and 236 Albion Road, Rexdale, Ontario, including resident superintendents, save and except property manager, office and clerical staff." (5 employees in the unit). (*Having regard to the agreement of the parties*).

**1857-80-R:** United Steelworkers of America (Applicant) v. Square D Canada Electrical Equipment Inc./Equipment Electrique Square D Canada Inc. (Respondent).

Unit: "all office and clerical employees of the respondent at Port Colborne, Ontario, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, plant nurse, sales staff, and secretary to plant manager and personnel supervisor." (16 employees in the unit).

**1959-80-R:** Labourers' International Union of North America - Local 183 (Applicant) v. 435385 Ontario Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and



except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**1962-80-R:** Ontario Public Service Employees Union (Applicant) v. Religious Hospitallers of St. Joseph of the Hotel Dieu of Kingston (Respondent) v. Ontario Nurses’ Association (Intervener) v. Group of Employees (Objectors).

Unit: “all (lay) employees of the respondent in Kingston, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, office and clerical staff, technical personnel, paramedical personnel, supervisors, foremen, persons above the rank of supervisor and foreman, chief engineers, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, students who are in training as part of an academic programme, persons covered by subsisting collective agreements and persons represented by the Ontario Nurses Association by virtue of Board certificates dated August 19, 1989 and October 16, 1989, (Board File No. 0967-80-R).” (159 employees in the unit). (*Having regard to the agreement of the parties*). (*Amended certificate*).

**2021-80-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304 (Applicant) v. The Corporation of the County of Simcoe (Respondent).

Unit: “all employees of the respondent in its Road Department, save and except foremen and supervisors, persons above the rank of foreman and supervisor, surveyors, draftsmen, office and clerical staff, and students employed during the school vacation period.” (52 employees in the unit).

**2024-80-R:** Labourer’s International Union of North America–Local 183(Applicant) v. Unique Paving Stone Incorporated (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (13 employees in the unit).

**2106-80-R:** Amalgamated Clothing and Textile Workers Union – Toronto Joint Board (Applicant) v. Perfect Hosiery Manufacturing Company Division of Centennial Hosiery Manufacturing Company Limited (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, designers, office and sales staff.” (34 employees in the unit.) (*Having regard to the agreement of the parties*).

**2121-80-R:** United Steelworkers of America (Applicant) v. Ashker’s Welding Products Limited (Respondent).

Unit: “all employees of the respondent in the Township of Elliott Lake, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period.” (13 employees in the unit).

**2125-80-R:** Energy & Chemical Workers Union (Applicant) v. Diamond Shamrock Canada Limited (Respondent) v. Oil, Chemical & Atomic Workers International Union, Local 9-780 (Intervener).

Unit: “all quality control laboratory technicians employed by the respondent at its plant at 162 Ward Avenue, Hamilton, Ontario, save and except supervisors, assistant supervisors, persons above the rank

of assistant supervisor and employees covered by subsisting collective agreement.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

**2126-80-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Intercity News Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent working in Ottawa, Ontario, save and except the terminal manager, those above the rank of terminal manager and sales staff.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

**2130-80-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the Municipality of Neebing (Respondent) v. Employee (Objector).

Unit: “all employees of the respondent, save and except foremen, those above the rank of foreman, persons regularly employed for not more than 24 hours per week, students employed during school vacation period, office and clerical staff.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

**2131-80-R:** Canadian Union of Public Employees (Applicant) v. Hydro Electric Commission of the Township of Nipigon (Respondent).

Unit: “all employees of the respondent in the Township of Nipigon, save and except office employees, foremen and those above the rank of foreman and persons regularly employed for not more than 24 hours per week.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

**2148-80-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. ASL Traffic Management Limited (Respondent).

Unit: “all employees of the respondent in Oakville, Ontario, save and except foremen, persons above the rank of foreman, office, sales and technical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (13 employees in the unit). (*Having regard to the agreement of the parties*).

**2149-80-R:** United Steeworkers of America (Applicant) v. Pansilver Partnership (Respondent).

Unit: “all employees of the respondent at its mine in Bucke Township, District of Temiskaming, save and except foremen, shift bosses, persons above the rank of foreman and shift boss, office and clerical staff and security guards.” (18 employees in the unit). (*Having regard to the agreement of the parties*).

**2150-80-R:** Service Employees Union, Local 204 Affiliated with A.F.L., C.I.O., C.L.C. (Applicant) v. Modern Building Cleaning Division of Dustbane Enterprises Limited (Respondent).

Unit: “all employees of the respondent at the Dundas Tower and Galleria area of the Eaton Centre in the Municipality of Metropolitan Toronto, engaged in cleaning services, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff.” (30 employees in the unit). (*Having regard to the agreement of the parties*).

**2156-80-R:** United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C. (Applicant) v. Mullers Meats Limited (Respondent).

Unit: “all employees of the respondent in Niagara Falls, Ontario, save and except foremen, head shipper, persons above the rank of foreman and head shipper, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (40 employees in the unit). (*Having regard to the agreement of the parties*).

**2158-80-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Eto Gourmet Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 10 Shallmar Blvd. Toronto, Ontario including resident superintendents save and except property manager, office and clerical staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

**2159-80-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Metro International Inc. (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 250 Davenport Road, Toronto, Ontario, including resident superintendents, save and except property manager, office and clerical staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

**2160-80-R:** United Steeworkers of America (Applicant) v. Dundas-Jafine Industries Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (24 employees in the unit). (*Having regard to the agreement of the parties*).

**2161-80-R:** Labourers' International Union of North America Local 183 (Applicant) v. Treal Maintenance (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 200 Wellesley Street East, 275, 325 and 375 Bleeker Street, Toronto, including resident superintendents, save and except property manager, persons above the rank of property manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (14 employees in the unit). (*Having regard to the agreement of the parties*).

**2163-80-R:** Canadian Union of Public Employees (Applicant) v. Rehabilitation Foundation for the Disabled (Respondent).

Unit: "all employees of the respondent in the City of Sault Ste. Marie, in the District of Algoma, save and except the business manager, persons above the rank of business manager, the confidential secretary to the regional director, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (12 employees in the unit). (*Having regard to the agreement of the parties*).

**2171-80-R:** United Steelworkers of America (Applicant) v. Allied Conveyors Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Pickering, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (47 employees in the unit). (*Having regard to the agreement of the parties*).

**2192-80-R:** International Union of Electrical, Radio and Machine Workers (Applicant) v. Motor Coils Manufacturing Co. Ltd. (Respondent).

Unit: "all employees of the respondent in the City of Brockville, save and except foremen, all persons above the rank of foreman, and office, clerical and sales personnel." (39 employees in the unit). (*Having regard to the agreement of the parties*).

**2200-80-R:** Canadian Union of Public Employees (Applicant) v. Waterloo County Roman Catholic Separate School Board (Respondent).



Unit: "all office and clerical employees of the respondent in the Regional Municipality of Waterloo, save and except supervisors and those above the rank of supervisor, personnel assistant, executive assistant to the director of education, secretary to director of education, secretaries to the superintendents, secretary to the controller of plant and maintenance, secretary to personnel supervisor, persons doing office and clerical work of St. Mary's Girls' High School and St. Jerome's Boys' School, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period." (79 employees in the unit). (*Having regard to the agreement of the parties*).

**2222-80-R:** Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Canadian Gypsum Company Ltd. (Respondent).

Unit: "all employees of the respondent at 560 Commissioners Street, in Metropolitan Toronto, save and except foremen, those above the rank of foreman, research, sales, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (90 employees in the unit). (*Having regard to the agreement of the parties*).

**2225-80-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Humpty Dumpty Foods Ltd. (Respondent).

Unit: "all employees of the respondent at Windsor, Ontario, save and except supervisors, those above the rank of supervisor and office staff." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**2226-80-R:** Canadian Union of Public Employees (Applicant) v. Owen Sound Public Utilities Commission (Respondent).

Unit: "all employees of the respondent in Owen Sound, save and except foremen, those above the rank of foreman, office and sales staff and students employed during the school vacation period." (24 employees in the unit). (*Having regard to the agreement of the parties*).

**2231-80-R:** The Canadian Union of Public Employees (Applicant) v. St. Joseph's General Hospital (Respondent) v. Ontario Public Service Employees Union (Intervener).

Unit: "all lay employees of the respondent in Peterborough, employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, chief engineer and office staff, and employees covered by subsisting collective agreements." (80 employees in the unit). (*Having regard to the agreement of the parties*).

**2233-80-R:** United Food & Commercial Workers, Local Union 725, AFL, CIO, CLC (Applicant) v. Better Buy Discount Stores Ltd. Trading as Economy Fair Discount Store (Respondent).

Unit #1: "all employees of the respondent, in its stores in Dunnville, Ontario, save and except Store Managers, persons above the rank of Store Manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (7 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in its stores in Dunnville, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the summer vacation period, save and except Store Managers and persons above the rank of Store Manager." (4 employees in the unit). (*Having regard to the agreement of the parties*).

**2241-80-R:** The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494; 1007; 1410; 1425; 1592; 1669; 1916 and 2309 (Applicant) v. Binks Manufacturing Company (Respondent).

Unit: "all millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector and all millwrights and millwrights' apprentices in the employ of the respondent in all other sectors in the County of Ontario (except the Townships of Pickering, Rama and Mara) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**2243-80-R:** Retail Clerks Union, Local 309 (Applicant) v. Beaver Foods Limited (Respondent).

Unit: "all employees of the respondent at the Abitibi Provincial Mill Cafeteria, Thunder Bay, Ontario, save and except manager, chef, and persons above those ranks." (14 employees in the unit). (*Having regard to the agreement of the parties*).

**2244-80-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Euro Crane Erector Inc. (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in the construction industry in the Province of Ontario and all ironworkers and ironworkers' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of foreman." (2 employees in the unit).

**2245-80-R:** Service Employees International Union, Local 183, A.F.L., C.I.C., C.L.C. (Applicant) v. Village Green Nursing Home (Respondent).

Unit: "all employees of the respondent at Selby, Ontario, employed for not more than twenty-four (24) hours per week, including students employed during the school vacation, save and except professional nursing staff, physiotherapists, supervisors and persons above the rank of supervisor, office staff and persons covered by a subsisting collective agreement." (12 employees in the unit). (*Having regard to the agreement of the parties*).

**2251-80-R:** United Brotherhood of Carpenters and Joiners of America, Drywall, Acoustic Lathing and Insulation, Local 675 (Applicant) v. Pagani Brothers Lathing Co. Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

**2256-80-R:** Service Employees Union, Local 210, affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. Brookhaven Nursing Home (Respondent).

Unit: "all employees of the respondent at Wingham, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses, office staff, physiotherapists, occupational therapist, and activities director." (28 employees in the unit). (*Having regard to the agreement of the parties*).

**2281-80-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Alnor Earthmoving Limited (Respondent).

Unit: "all employees of the respondent within a fifty mile radius of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (41 employees in the unit).

**2282-80-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1190 (Applicant) v. Peter Bakker Construction (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**2283-80-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1190 (Applicant) v. Bills Carpentry (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**2284-80-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1190 (Applicant) v. Mac Carpentry (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**2300-80-R:** Ontario Public Service Employees Union (Applicant) v. Times Changes Women's Employment Service Inc. (Respondent).

Unit: "all employees of the respondent employed in the Municipality of Metropolitan Toronto, Ontario." (7 employees in the unit). (*Having regard to the agreement of the parties*).

**2301-80-R:** International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Cloverleaf Hotel, Division of MIB Holdings Ltd. (Respondent).

Unit: "all bartenders, tapmen, cashiers, waiters, waitresses, barboys, improvers and Beerex operators in the employ of the respondent in the area known as the Normandy Room in the Cloverleaf Hotel at 619 Evans Avenue, Etobicoke." (17 employees in the unit). (*Having regard to the agreement of the parties*).

**2308-80-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC (Applicant) v. Beatrice Foods (Ontario) Limited, Model Dairy Division (Respondent).

Unit: "all office, clerical and laboratory employees of the respondent at Sault Ste. Marie, save and except office managers, persons above the rank of office manager and clerk/confidential secretary to the office manager." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**2309-80-R:** Canadian Union of Public Employees (Applicant) v. Canadian Red Cross Society, Ontario Division Red Cross Hospital (Respondent).



Unit #1: "all employees of the respondent at its hospital in Richards Landing, Ontario, save and except professional medical staff, graduate and undergraduate nurses, paramedical personnel, office and clerical staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at its hospital in Richards Landing, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate and undergraduate nurses, paramedical personnel, office and clerical staff, supervisors, and persons above the rank of supervisor." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**2324-80-R:** United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, Local 675 (Applicant) v. Joe Gargaro Lathing & Drywall (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

**2325-80-R:** Canadian Union of Public Employees (Applicant) v. Emmanuel Howard Park United Day Nursery (Respondent).

Unit: "all employees of the respondent at its Day Care Centre in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than twenty-four (24) hours per week." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**2333-80-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Retail Environments Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**2335-80-R:** Canadian Union of Public Employees (Applicant) v. St. Brigid's Community Day Nursery Centre (Respondent).

Unit: "all employees of the respondent at its Day Care Centre in the City of Toronto, save and except supervisors, and persons above the rank of supervisor." (14 employees in the unit). (*Having regard to the agreement of the parties*).

**2346-80-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1190 (Applicant) v. Beaver Carpentry (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**2347-80-R:** Canadian Paperworkers Union (Applicant) v. Atlantic Packaging Products Ltd. (Respondent).

Unit: "all employees of the respondent at its paper mill operations at Scarborough, save and except foremen, persons above the rank of foreman, office staff and persons covered by subsisting collective agreements." (4 employees in the unit). (*Having regard to the agreement of the parties*).

**2348-80-R:** Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. All Star Tours Ltd. (Respondent).

Unit: "all employees of the respondent in Cambridge, Ontario, save and except manager and persons above the rank of manager." (8 employees in the unit). (*Having regard to the agreement of the parties*).

**2352-80-R:** Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Applicant) v. Magic Pantry Foods Inc. (Respondent).

Unit: "all employees of the respondent in the City of Hamilton, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (119 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

**2360-80-R:** Canadian Union of Operating Engineers and General Workers (Applicant) v. Modern Building Cleaning a Division of Dustbane Enterprises Limited (Respondent).

Unit: "all employees of the respondent at the Riverside Hospital in Ottawa engaged in cleaning services, save and except foremen and foreladies, office, clerical and sales staff." (38 employees in the unit). (*Having regard to the agreement of the parties*).

**2372-80-R:** United Brotherhood of Carpenters and Joiners of America, Drywall, Acoustic Lathing and Insulation (Applicant) v. Waco Drywall Services (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

**2373-80-R:** Canadian Union of Public Employees (Applicant) v. The Governing Council of the University of Toronto (Respondent).

Unit: "all non-professional employees of the University of Toronto Libraries at the St. George Campus working under the control and direction of the Chief Librarian of the University of Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor, Bibliographers (selector), Bibliographic Associates II and persons covered by subsisting collective agreements." (330 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

**2375-80-R:** Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Westway Forwarding Limited (Respondent).

Unit: “all dependent contractor truck drivers in the employ of the respondent at Concord, Ontario.” (17 employees in the unit). (*Having regard to the agreement of the parties*).

**2406-80-R:** Amalgamated Clothing and Textile Workers (Applicant) v. Oaklite Division of Susan Shoe Industries Ltd. (Respondent).

Unit: “all employees of the respondent at Oakville, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

**2435-80-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1190 (Applicant) v. Islay General Contractor (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Onatrio, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**2441-80-R:** International Brotherhood of Painters and Allied Trades – Local Union 1891 (Applicant) v. Joe Gargaro Lathing & Insulation (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (4 employees in the unit). (*clarity note*).

## APPLICATIONS CERTIFIED SUBSEQUENT TO PRE-HEARING VOTE

**2031-80-R:** Ontario Nurses’ Association (Applicant) v. The Etobicoke General Hospital (Respondent).

Unit: “all registered and graduate nurses regularly employed for not more than twenty-four(24) hours per week in a nursing capacity by The Etobicoke General Hospital in Etobicoke, Ontario, save and except Head Nurses, persons above the rank of Head Nurse, Employee Health Nurse, In-service Education Co-ordinators and Infection Control Nurse.” (245 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list	235
Number of persons who cast ballots	120
Number of ballots marked in favour of applicant	75
Number of ballots marked against applicant	42
Ballots segregated and not counted	3

**2137-80-R:** Canadian Union of Operating Engineers and General Workers (Applicant) v. ITE Industries Limited (Respondent) v. The Draftsmen’s Association of Ontario, Local 164, International Federation of Professional & Technical Engineers (Intervener).

Unit: “all persons employed and classified as Draftsmen, Apprentice draftsmen and tracers, in the employ of the respondent at its switchgear division, Mississauga, Ontario save and except drafting supervisors and persons above the rank of Drafting Supervisor, Engineers, Clerical, Sales, Production, Manufacturing, Accounting, Quality Control & Industrial Engineering personnel.” (25 employees in the unit). (*Having regard to the agreement of the parties*).



Number of names of persons on revised voters' list		27
Number of persons who cast ballots		27
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	22	
Number of ballots marked in favour of intervener	4	

## APPLICATIONS CERTIFIED SUBSEQUENT TO POST-HEARING VOTE

**0902-8-R:** United Food and Commercial Workers International Union (Applicant) v. Inglebrook Nursing Home Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Fergus, save and except supervisor and persons above the rank of supervisor, registered nurses and office staff." (37 employees in the unit). (*clarity note*).

Number of names of persons on list as originally prepared by employer		36
Number of persons who cast ballots		37
Number of ballots marked in favour of applicant	23	
Number of ballots marked against applicant	12	
Ballots segregated and not counted	2	

**1487-80-R:** Retail Clerks Union, Local 409 (Applicant) v. Central Hotel (Dryden) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Town of Dryden, save and except manager, assistant manager, persons above the rank of assistant manager, and secretary." (61 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		52
Number of persons who cast ballots		52
Number of ballots marked in favour of applicant	37	
Number of ballots marked against applicant	21	
	16	

**2032-80-R:** United Steelworkers of America (Applicant) v. Irwin Toy Limited (Respondent).

Unit: "all employees of the respondent employed at 165 North Queen Street, Etobicoke, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff and students employed during the school vacation period." (100 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		94
Number of persons who cast ballots		92
Number of ballots marked in favour of the applicant	54	
Number of ballots marked against the applicant	38	

**2041-80-R:** International Association of Machinists and Aerospace Workers (Applicant) v. Canada Valve Limited (Respondent).

Unit: "all employees of the "manufacturing division" of the respondent employed at 180 Market Drive, Milton, Ontario save and except assistant foreman, office and clerical employees, sales staff and students employed during the school vacation period." (50 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		50
Number of persons who cast ballots	49	
Number of ballots marked in favour of the applicant	27	
Number of ballots marked against the applicant	22	

## Applications for Certification Dismissed

### No Vote Conducted

**0793-80-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Applicant) v. Collavino Incorporated (Respondent) v. The Electrical Power Systems Construction Association (Intervener).

Unit: “all ironworkers and ironworkers apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama, and Mara) and the County of Durham (except the Township of Hope), excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by a subsisting voluntary recognition agreement or collective agreement.” (3 employees in the unit).

**1539-80-R:** The Association of Canadian Film Craftspeople (Applicant) v. Norfolk Communications Ltd. (Respondent).

**1742-80-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Doug Wright Const. Co. Ltd. (Respondent) v. Labourers’ International Union of North America – Local 1081 (Intervener) v. Group of Employees (Objectors).

**2108-80-R:** Bricklayers and Allied Craftsmen (Applicant) v. Falls Masonry Contractor (Respondent).

**2250-80-R:** International Union of Bricklayers and Allied Craftsmen (Applicant) v. Pietrangelo Masonry (Respondent).

### Certification Dismissed Subsequent to A Pre-Hearing Vote

**1800-80-R:** Canadian Union of Public Employees (Applicant) v. Manitoulin Health Centre (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener).

Unit: “all office, clerical and technical employees of the respondent at Little Current, Ontario, save and except the secretary to the Administrator, secretary to the Director of Nursing, supervisors, those above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees covered by subsisting collective agreements.” (14 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	7	

**2136-80-R:** Ontario Public Service Employees Union (Applicant) v. St. Mary’s General Hospital (Respondent).

Unit: #1: “all office and clerical employees of the respondent in Timmins, Ontario, save and except

supervisors, persons above the rank of supervisor, secretaries to the administrator, secretary to the Director of Personnel, secretary to the Director of Nursing, secretary to the Director of Finance, purchasing officer, admitting officer, senior switchboard operator, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons covered by subsisting applications, certificates or collective agreements." (63 employees in the unit). (*Having regard to the agreement of the parties*).

Number of persons on voters' list at start of vote		53
Number of persons who cast ballots	49	
Number of ballots marked in favour of applicant	23	
Number of ballots marked against applicant	26	

Unit #2: "all office and clerical employees of the respondent in Timmins, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, secretaries to the administrators, secretary to the Director of Personnel, secretary to the Director of Nursing, secretary to the Director of Finance, Purchasing officer, admitting officer, senior switchboard operator, and persons covered by subsisting applications certificates or collective agreements." (6 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	4	

**2187-80-R:** Graphic Arts International Union, Local 211 Toronto, Ontario (Applicant) v. Bonar & Bemis Ltd. (Respondent) v. Printing Specialties and Paper Products Union, Local 466 (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervising foremen, persons above the rank of foreman, office staff, professional engineers and watchmen-janitors." (56 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		54
Number of persons who cast ballots	51	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	14	
Number of ballots marked in favour of intervener	34	

### Certification Dismissed Subsequent to A Post-Hearing Vote

**1190-80-R:** United Steelworkers of America (Applicant) v. Sling-Choker Manufacturing Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent company in Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (6 employees in the unit).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	5	
Ballots segregated and not counted	1	



**1414-80-R: Canadian Paperworkers Union (Applicant) v. Waldec of Canada Ltd. (Respondent).**

Unit: "all employees of the respondent at the Municipality of Metropolitan Toronto, save and except supervisors, foremen, persons above the rank of supervisor or foreman, office and sales staff, and employees regularly employed for not more than twenty-four hours per week." (3 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		117
Number of persons who cast ballots	110	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	46	
Number of ballots marked against applicant	61	
Ballots segregated and not counted	2	

**1914-80-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Hoffman Concrete Products Limited (Respondent) v. Group of Employees (Objectors).**

Unit: "all employees of the respondent at Cambridge save and except foremen, persons above the rank of foreman, dispatcher, office, clerical and sales staff." (21 employees in the unit).

Number of names of persons on list as originally prepared by employer		20
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	10	

**1950-80-R: Canadian Paperworkers Union (Applicant) v. Packaging Group of Domtar Inc. (Respondent) v. Group of Employees (Objectors).**

Unit: "all office and clerical employees of the respondent at Kitchener, save and except supervisors, persons above the rank of supervisor, production scheduler, sales staff, confidential secretary to the plant manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (23 employees in the unit). (*Having regard to the agreement of the parties*).

Number of persons on voters' list at start vote		19
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	14	

**2204-80-R: Teamster Local Union 132, Chemical Energy and Allied Workers Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehouse & Helpers of America (Applicant) v. PRC Chemical Corporation of Canada Ltd. (Respondent) v. Group of Employees (Objectors).**

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (36 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		37
Number of persons who cast ballots	37	
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	27	

### **Applications for Certification Withdrawn**

**0782-80-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Humane Society Division 028, Keswick, Ontario (Respondent) v. C.U.P.E. Local 1323 (Intervener).

**1295-80-R:** Canadian Union of Public Employees (Applicant) v. Canadian Red Cross Society (Ontario Division) (Respondent).

**2129-80-R:** Canadian Union of Public Employees (Applicant) v. Municipality of Gillies (Respondent).

**2172-80-R:** United Steelworkers of America (Applicant) v. Hy-Tower Mines Inc. (Respondent).

**2173-80-R:** Canadian Paperworkers Union (Applicant) v. Atlantic Packaging Products Ltd. (Respondent).

**2213-80-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Uxbridge Beverages Ltd. (Respondent) v. Group of Employees (Objectors).

**2279-80-R:** Labourers' International Union of North America – Local 183 (Applicant) v. Urban Mechanical Contracting (1979) Ltd. (Respondent).

**2315-80-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. United Co-operatives of Ontario (Respondent).

**2336-80-R:** Hotel, Restaurant and Cafeteria Employees' Union, Local 75 Toronto, of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.I.O.-C.L.C.) (Applicant) v. Hotel Canadian (Respondent).

**2361-80-R:** Retail, Commercial & Industrial Union, Local 206 Chartered by United Food & Commercial Workers International Union (Applicant) v. Canadian of Canada Limited (Ontario) (Respondent).

**2374-80-R:** Canadian Union of Public Employees (Applicant) v. University of Western Ontario (Respondent).

**2376-80-R:** The Grey County Board of Education Secretarial Association (Applicant) v. The Grey County Board of Education (Respondent).

**2448-80-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Tri-Sure Products Ltd. (Respondent).

### **APPLICATIONS FOR ACCREDITATION**

**0415-79-R:** Metropolitan Toronto Residential Painting Contractors Association (Applicant) v. Local 1891 of the Ontario Council of the International Brotherhood of Painters and Allied Trades (Respondent) v. Architectural Galss & Metal Contractors Association (Intervener #1) v. Ontario Painting Contractors Association (Intervener #2). (*Granted*).

## APPLICATIONS UNDER SECTION 1(4)

**1452-79-R:** Christian Labour Association of Canada (Applicant) v. Al Smith Plastering & Partition Co. Limited and Barrie Plastering, Drywall & Acoustics Co. Limited (Respondents) v. Carpenters District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America (Intervener). (*Dismissed*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**0172-80-R:** Joseph Foley (Applicant) v. International Brotherhood of Painters and Allied Trades, International Brotherhood of Painters and Allied Trades Local 200, The Ontario Council of the International Brotherhood of Painters and Allied Trades (Respondents) v. A.N. Shaw & Sons (Eastern) Ltd. (Intervener). (*Granted*).

Unit: "all employees of the intervener covered by the collective agreement between the Ontario Painting Contractors Association, Acoustical Association of Ontario, The Interior Systems Contractors Association – and – The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades." (7 employees in the unit).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	10	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	10	

**1617-80-R:** Mike Skobernicky, Sharon J. Miller, Karen Kuchna, Lorna Young, Sharon Conrod, and Christine Alexander (Applicants) v. Labourers' International Union of North America, Local 183 (Respondent) v. Ontario Humane Society (Intervener). (*Withdrawn*).

**1909-80-R:** William Robertson (on behalf of Employees of Lakehead Board of Education) (Applicant) v. Service Employees Union Local 268 (Respondent). (*Granted*).

Unit: "all employees of the Board, save and except the foremen, persons above the rank of foreman, administrative staff, teachers, academic staff, persons employed under twenty (20) hours per week averaged over a seven (7) week period, students and casual help employed from May 1st to September 15th." (202 employees in the unit).

Number of names of persons on revised voters' list		279
Number of persons who cast ballots	240	
Number of ballots marked in favour of respondent	19	
Number of ballots marked against respondent	220	
Ballots segregated and not counted	1	

**1945-80-R; 1948-80-R:** The International Brotherhood of Painters and Allied Trades Local 1824 (Applicant) v. Canadian Pittsburgh Industries Division of PPG Industries Canada Ltd. (Respondent). (*Granted*).

**1999-80-R:** Kenneth L. Althouse (Applicant) v. Amalgamated Clothing and Textile Workers Union and its Local 2383 AFL-CIO-CLC (Respondent) v. Solaray, Division of Sunbeam Corporation (Canada) Limited (Intervener). (*Granted*).

Unit: "all employees of Solaray, Division of Sunbeam Corporation (Canada) Limited at Waterford, save and except foreman, foreladies, persons above the rank of foreman and forelady, office and sales



staff, laboratory personnel, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (3 employees in the unit).

Number of names of persons on list as originally prepared by employer		32
Number of persons who cast ballots		34
Number of ballots marked in favour of respondent	15	
Number of ballots marked against respondent	19	

**2018-80-R:** Dolores Schertzberg, Janet Stevens, Deirdre Biehn (Applicants) v. International Woodworkers of America (Respondent) v. Evenflo Division of Questor Commercial Inc. (Intervener). (*Granted*).

Unit: "all employees of the intervener at Brantford, Ontario, save and except foremen, persons above the rank of foreman, office staff, sales staff, persons regularly employed for not more than twenty-four hours per week and students employed for the school vacation period." (3 employees in the unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots		3
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	3	

**2096-80-R:** Robert James Dodds (Applicant) v. Retail, Wholesale and Department Store Union, and its Local 440 (Respondent) v. Canada Dry Limited (Intervener). (*Granted*).

Unit: "all employees of Canada Dry Limited employed at Kingston, save and except foremen, persons above the rank of foreman, office staff, advance salesmen, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (8 employees in the unit).

**2206-80-R:** Silvia Dmitruk and a Group of Employees (Applicants) v. Teamsters Local Union No. 419, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. Cottrell Forwarding Ltd. (Intervener). (*Granted*).

**2209-80-R:** Group of Employees (Applicant) v. Hotels, Clubs, Restaurants and Tavern Employees' Union, Local 261 (Respondent) v. Fuller's Restaurant (Intervener). (*Granted*).

Unit: "all employees of Fuller's Restaurant working at 809 Richmond Road, Ottawa, Ontario, who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant managers, management trainees, kitchen managers and persons above those ranks, and office staff." (16 employees in the unit).

**2246-80-R:** Ronald Fleury, Roger Richards, Eaton Tansley, Elisabeth Hayes, Leslie Markham, Katherine Monk, Marie Millesse and Alice Maybanks (Applicants) v. Ontario Taxi Association, 1688 C.L.C. (Respondent). (*Granted*).

**2291-80-R:** Hein-Werner of Canada Ltd. (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Respondent). (*Granted*).

**2297-80-R:** David Lewis (Applicant) v. International Beverage Dispensers' and Bartenders' Union Local 280 (Respondent) v. Queensbury Arms (Intervener). (*Dismissed*).

**2302-80-R:** Peel Condominium Corporation No. 149 (Applicant) v. Labourers' International Union of North America (Respondent). (*Dismissed*).

**2482-80-R:** Maxine Robichaud on behalf of the Employees of North American Fabricators Ltd. (Applicant) v. United Steelworkers of America (Respondent). (*Dismissed*).

Unit: "all employees of North American Fabricators Limited in Aurora, save and except persons above the rank of foreman, office and sales staff." (18 employees in the unit).

## **APPLICATIONS UNDER SECTION 54**

**2216-80-R:** Office and Professional Employees International Union Local 343 (Applicant) v. Association of Commercial and Technical Employees Union No. 1704 (Respondent). (*Granted*).

## **APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL**

**2320-80-R:** Structural Formwork Limited (Applicant) v. Labourers' International Union of North America, Local 837, J. Vella, R. Buckborough, L. Evangelisti, M. Stante, A. Dinoia (Respondents). (*Withdrawn*).

**2384-80-R:** Trans-Nation Incorporated (Applicant) v. The Toronto-Central Ontario Building and Construction Trades Council, Marble, Tile & Terrazzo Union – Local 31, International Brotherhood of Painters and Allied Trades District Council 46, Carpenters' District Council of Toronto and Vicinity United Brotherhood of Carpenters and Joiners of America, Philip Robichaud, Ross Taylor, and Sergio Pantarotto (Respondents). (*Granted*).

## **APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL**

**1420-80-R:** The Association of Canadian Film Craftspeople (Applicant) v. Norfolk Communications Ltd. (Respondent). (*Withdrawn*).

## **APPLICATIONS FOR CONSENT TO PROSECUTE**

**0461-80-R:** Great Lakes Forest Products Limited (Applicant) v. International Brotherhood of Electrical Workers, Local 1565 (Respondent). (*Terminated*).

## **COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)**

**0043-80-U:** Elmer Butler (Complainant) v. The URW Local 494, Mr. Wm. Love (Respondent) v. Firestone Canada Incorporated (Intervener). (*Dismissed*).

**0268-80-U:** Great Lakes Forest Products Limited (Complainant) v. International Brotherhood of Electrical Workers, Local 1565 (Respondent). (*Terminated*).

**0846-80-U:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Complainant) v. National Dry Company Ltd. (Respondent). (*Withdrawn*).

**0998-80-U:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Complainant) v. National Dry Company Limited (Respondent). (*Withdrawn*).

**1033-80-U:** Werner Voges (Complainant) v. Rudolph's Specialty Bakeries Ltd. (Respondent). (*Dismissed*).

**1034-80-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Rudolph's Specialty Bakeries Ltd. (Respondent). (*Dismissed*).

**1146-80-U:** Canadian Paperworkers Union (Complainant) v. Waldec of Canada Ltd. (Respondent). (*Dismissed*).

**1262-80-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Complainant) v. Birla Industries, Inc. (Respondent). (*Granted*).

**1289-80-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (Complainant) v. Starplex Scientific Division of Canadian Medical Laboratories Limited (Respondent). (*Granted*).

**1419-80-U:** The Association of Canadian Film Craftspeople (Complainant) v. Norfolk Communications Ltd. (Respondent). (*Withdrawn*).

**1489-80-U:** Labourers' International Union of North America, Local Union 183 (Complainant) v. Ontario Humane Society (Respondent). (*Withdrawn*).

**1534-80-U:** C.U.P.E. Local 543 (Complainant) v. The Corporation of the City of Windsor (Respondent). (*Dismissed*).

**1535-80-U:** C.U.P.E. Local 543 (Complainant) v. Corporation of the City of Windsor (Respondent). (*Dismissed*).

**1691-80-U:** International Union of Operating Engineers, Local 793 (Complainant) v. Falcon Metals Inc. (Respondent). (*Withdrawn*).

**1762-80-U:** Myrna Wood (Complainant) v. Canadian Red Cross Blood Transfusion Service Employees Association (Respondent) v. Canadian Red Cross Blood Transfusion Service, Hamilton, Centre (Intervener). (*Dismissed*).

**1773-80-U; 1807-80-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. G. H. Johnson's Furniture (Ottawa) Limited (Respondent). (*Withdrawn*).

**1884-80-U:** Roy Bennett (Complainant) v. Ed Ferrari (Respondent). (*Withdrawn*).

**1901-80-U:** Ontario Nurses' Association (Complainant) v. St. Mary's General Hospital (Timmins) (Respondent). (*Withdrawn*).

**2028-80-U:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chaufferus, Warehousemen and Helpers of America (Complainant) v. Air Products, Division of Catalytic Enterprises Limited (Respondent). (*Granted*).

**2029-80-U:** Pero Levata (Complainant) v. United Auto Workers Local 195 (Respondent). (*Dismissed*).

**2093-80-U:** Teamsters Local Union No. 990, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Mount Mc Kay Feed Co. Limited (Respondent). (*Dismissed*).



**2095-80-U:** Teamsters Local Union No. 990, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Mount McKay Feed Co. Limited (Respondent). (*Withdrawn*).

**2097-80-U:** Richard Arnold (Complainant) v. International Harvester Company (Respondent). (*Withdrawn*).

**2099-80-U:** International Union United Automobile – Aerospace – Agricultural Implement Workers of America (UAW) Amalgamated Local 127 and Robert J. Hamilton (Complainants) v. International Harvester (Respondent). (*Withdrawn*).

**2105-80-U:** Ontario Public Service Employees Union (Complainant) v. Madame Vanier Children's Services (Respondent). (*Withdrawn*).

**2109-80-U:** Joseph Kukucska (Complainant) v. Local 483 of the United Transportation Union (Respondent). (*Withdrawn*).

**2112-80-U:** Robert Frederick Schwartz (Complainant) v. Canadian Paper Workers Union, Local 1196 (Respondent) v. Domtar Packaging (Corrugated Containers Division) (Intervener). (*Dismissed*).

**2122-80-U:** Raphael A. Julien (Complainant) v. Local #46 Plumbers & Steamfitters (Respondent) v. Ontario Hydro (Intervener). (*Dismissed*).

**2123-80-U:** International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees' and Bartenders International Union A.F.L.-C.I.O.-C.L.C. (Complainant) v. 437421 Ontario Limited c.o.b. as Sammy's Exchange (Respondent). (*Withdrawn*).

**2142-80-U:** Hotel and Restaurant Employees Union, Local 756 (Complainant) v. Hillcrest Restaurant (Respondent). (*Withdrawn*).

**2151-80-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. A.S.L. Traffic Management Limited (Respondent). (*Withdrawn*).

**2152-80-U:** United Food and Commercial Workers International Union (Complainant) v. C.H.P. Developments (Respondent). (*Withdrawn*).

**2165-80-U:** Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Metal Bending & Furniture Company Inc. (Siegfried Krieser Industries Limited) (Respondent). (*Withdrawn*).

**2179-80-U:** The International Beverage Dispensers' & Bartenders' Union, Local 280 (Complainant) v. 459222 Ontario Limited, cob as The Royal Oak Public House (Respondent). (*withdrawn*).

**2181-80-U:** Hotel, Motel and Restaurant Employees and Beverage Dispensers' Union, Local 757 (Complainant) v. Hodder Avenue Hotel (Respondent). (*Withdrawn*).

**2190-80-U:** Camillo Manfredi (Complainant) v. Canadian Construction, Building Maintenance and General Workers Union (Respondent). (*Withdrawn*).

**2202-80-U:** United Steelworkers of America (Complainant) v. Dundas Jafnine Industries Limited (Respondent). (*Withdrawn*).

**2203-80-U:** St. Jacques Nursing Home (Complainant) v. Ontario Nurses' Association – and – Dorothy Fulford (Respondent). (*Withdrawn*).

**2234-80-U:** Gerald F. LaRiviere (Complainant) v. Burlington Steel Company, Division of Slater Steel, and United Steelworkers Union Local 4752 (Respondents). (*Withdrawn*).

**2235-80-U:** Office and Professional Employees International Union (Complainant) v. Buntin Reid Division of Domtar Paper Ltd. (Respondent). (*Withdrawn*).

**2237-80-U:** Domingo Ramos (Complainant) v. Anderson Metal Industries Inc. (Respondent). (*Adjourned sine die*).

**2240-80-U:** United Electrical, Radio and Machine Workers of America (UE) and its Local 514 (Complainant) v. C.R. Snelgrove Company (Respondent). (*Withdrawn*).

**2249-80-U:** John Claude Lemire (Complainant) v. Star Steel and Union United Brewers (Respondents). (*Withdrawn*).

**2253-80-U:** International Union of Operating Engineers, Local 796 (Complainant) v. Ottawa-Carleton Regional Hospital Food Services Inc. (Respondent). (*Withdrawn*).

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**2286-80-U:** Danny Kidd (Complainant) v. Canadian Paper Workers Union Local 1489 and Trent Valley Paper Brd. Mills (Respondents). (*Withdrawn*).

**2287-80-U:** United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C. (Complainant) v. Mullers Meats Limited (Respondent). (*Withdrawn*).

**2293-80-U:** Patrick Stennett (Complainant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 385-3 (Respondent). (*Withdrawn*).

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**2319-80-U:** United Food & Commercial Workers, Local Union 725, AFL, CIO, CLC (Complainant) v. Economy Fair Drug Mart (Title Stores Ltd.) (Respondent). (*Withdrawn*).

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**2350-80-U:** Office and Professional Employees International Union, Local 343 (Complainant) v. Toronto Central Ontario Building and Construction Trades Council (Respondent). (*Withdrawn*).

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**2477-80-OH:** Debra Oakes (Complainant) v. Crane Packing Co. Ltd. (Respondent). (*Withdrawn*).

**2490-80-OH:** Larry Nagle (Complainant) v. Richard Kostuk (Respondent). (*Withdrawn*).

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**2068-80-M:** Marinus Weeda (Applicant) v. United Automobile Aerospace and Agricultural Implement Workers of America (UAW) Local 636 (Respondent Trade Union) v. King Hydraulic Power Limited (Respondent Employer). (*Granted*).

**2069-80-M:** Cornelis De Blieck (Applicant) v. United Automobile Aerospace and Agricultural Implement Workers of America (UAW) Local 636 (Respondent Trade Union) v. King Hydraulic Power Limited (Respondent Employer). (*Granted*).

**2070-80-M:** Keith Kranendonk (Applicant) v. United Automobile Aerospace and Agricultural Implement Workers of America (UAW) Local 636 (Respondent Trade Union) v. King Hydraulic Power Limited (Respondent Employer). (*Granted*).

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**2247-80-M:** National Silicates Limited (Applicant) v. The United Rubber, Cork, Linoleum and Plastic Workers of America and its Local Lodge No. 771 (Respondent). (*Granted*).

**2328-80-M:** The Textile Rental Institute of Ontario (Applicant) v. Laundry, Dry Cleaning and Dye House Workers International Union, Local 351 (Respondent). (*Granted*).

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**1772-80-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Ferma Paving and Ferma Construction Limited (Respondent). (*Withdrawn*).



**1902-80-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Silverwod Dairies, Division of Silverwood Industries Limited (Respondent) v. Office and Professional Employees' International Union, Local 478 (Intervener #1) v. The Borden Company Limited (Intervener #2). (*Dismissed*).

**2178-80-R:** The International Beverage Dispensers' & Bartenders' Union, Local 280 (Applicant) v. 459222 Ontario Limited, c.o.c. as The Royal Oak Public House (Respondent) v. Norman Wagner (Intervener). (*Withdrawn*).

**2214-80-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Betti Drain & Concrete Ltd., Betti Construction Limited and Cloverlawn Drain & Concrete Ltd. (Respondent). (*Withdrawn*).

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**2100-80-M:** Canadian Union of Public Employees (Applicant) v. A.B.C. Nursery School (Respondent). (*Dismissed*).

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**1369-80-M:** Labourers' International Union of North America – Local 183 (Applicant) v. Ferma Paving (Respondent). (*Withdrawn*).

**1555-80-M:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. L K Acoustic Drywall Limited (Respondent). (*Granted*).

**1563-80-M:** Labourers' International Union of North America – Local 183 (Applicant) v. Special Foundation Systems Co. (Respondent). (*Withdrawn*).

**1639-80-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 2222 (Applicant) v. Thomas Construction (Galt) Limited (Respondent). (*Granted*).

**1680-80-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Vern Pedersen Contracting Ltd. (Respondent). (*Withdrawn*).

**1757-80-M:** Southern Ontario Newspaper Guild (Applicant) v. Globe and Mail (Respondent). (*Withdrawn*).

**1788-80-M; 1789-80-M; 1790-80-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Q-Sons Construction Company Limited (Respondent). (*Withdrawn*).

**1903-80-M:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Lewis Insulation Services Inc. (Respondent). (*Withdrawn*).

**1967-80-M:** International Brotherhood of Painters and Allied Trades, Ontario Council of the International Brotherhood of Painters and Allied Trades and International Brotherhood of Painters and Allied Trades, Local 1819 – Glaziers and Glassworkers (Applicants) v. Architectural Glass and Metal Contractors' Association, Jack Glass & Mirror Service and the Estate of Jacks Glass & Mirror Service, c/o Lando and Partners, Trustees In Bankruptcy (Respondents). (*Granted*).

**1968-80-M:** A Council of Trade Unions, acting as the representative and agent of Teamsters' Local Union No. 230, and Labourers' International Union of North America, Local 597 (Applicant) v. Oshawa Paving Company Limited (Respondent). (*Withdrawn*).

**2074-80-M:** Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Richard & B.A. Ryan Ltd. (Respondent). (*Granted*).

**2092-80-M:** International Union of Operating Engineers, Local 793 (Applicant) v. King Paving & Materials Limited, Division of Flintkote Company of Canada Limited (Respondent). (*Granted*).

**2119-80-M:** Ontario Council of Painters and Allied Trades Local 1590 (Applicant) v. Bagwell Coatings Canada Ltd. (Respondent). (*Granted*).

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**2290-80-M:** United Brotherhood of Carpenters and Joiners of America – Local Union 93 (Applicant) v. Gerry Lowrey Limited (Respondent). (*Withdrawn*).

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**2312-80-M:** The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190 (Applicant) v. Union Carpentry Contractors Ltd. (Respondent). (*Granted*).

**2318-80-M:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Magic Furniture and Interious Limited (Respondent). (*Granted*).

**2326-80-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Norland Construction Ltd. (Respondent). (*Granted*).

**2312-80-M:** The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190 (Applicant) v. Union Carpentry Contractors Ltd. (Respondent). (*Granted*).

**2318-80-M:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Magic Furniture and Interiors Limited (Respondent). (*Granted*).

**2326-80-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Norland Construction Ltd. (Respondent). (*Granted*).

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**2344-80-M:** Labourers' International Union of North America, Local 1036 (Applicant) v. Mirco Contractors Ltd. (Respondent). (*Withdrawn*).

**2354-80-M:** Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Peacock Interior Finishes Ltd. (Respondent). (*Withdrawn*).

**2356-80-M:** A council of Trade Unions acting as the Representative and Agent of Teamsters' Local 230 and Labourers' International Union of North America, Local 183 (Applicants) v. King Paving & Materials Limited, Division of Flintkote Company of Canada Limited (Respondent). (*Granted*).

**2357-80-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. T.S. Custom Woodworking (Respondent). (*Withdrawn*).

**2358-80-M:** The International Brotherhood of Painters and Allied Trades Local 1824 (Applicant) v. Bullas Glass Ltd. (Respondent). (*Withdrawn*).

**2366-80-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Grant Construction (Respondent). (*Withdrawn*).

**2371-80-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ranfas Engineering & Construction Ltd. (Respondent). (*Granted*).

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**2386-80-M:** Local 200 of the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicants) v. St. Lawrence Glass of the Architectural Glass and Metal Contractors Association (Respondent). (*Dismissed*).

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**2437-80-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. DMA Masonry Limited (Respondent). (*Withdrawn*).

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**2452-80-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Marks General Construction Company (Respondent). (*Withdrawn*).

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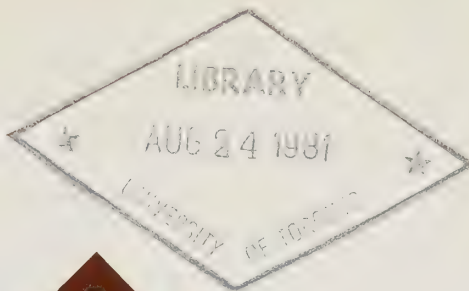
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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

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**2043-80-R Canadian Union of Industrial Employees, Applicant, v. Anderson Metal Industries Inc., Respondent, v. Group of Employees, Objectors.**

**Evidence – Representation Vote – Union official speaking to employees waiting to vote – No evidence of what was spoken – Whether breach of Registrar’s directions banning electioneering and propaganda – Whether Board drawing adverse inference from union official’s failure to testify – Whether Board directing new vote**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members C. G. Bourne and B. K. Lee.

**APPEARANCES:** *Michelle Swenarchuk, Peter Dorfman and Ed Elliott for the applicant; Mark M. Orkin for the respondent; Oleg Borkowitchenko for the objectors.*

**DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER C. G. BOURNE; April 13, 1981**

1. By decision dated January 21, 1981 in this application for certification, another panel of the Board directed that a representation vote be taken amongst the employees in the bargaining unit which was described as follows:

“All employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.”

The Board also appointed an officer to inquire into and report to the Board on the duties and responsibilities of Domingos Ramos whom the respondent claimed to be a foreman excluded by virtue of section 1(3)(b) of *The Labour Relations Act*.

2. As noted in that decision, the parties met and agreed upon voting arrangements on January 16, 1981. It was common ground among the parties that they were duly notified (by letters from the Registrar and by Notices of Taking of Vote posted on the respondent’s premises) that the representation vote would be held on Friday, January 30, 1981, from 3:30 p.m. to 4:30 p.m. in the respondent’s lunch room. It was also common ground among the parties that they were duly notified of the following direction which was made by the Registrar pursuant to Rule 43(j) of the Rules of Procedure: “I direct all interested persons to refrain and desist from propaganda and electioneering from midnight of Monday, January 26, 1981 until the vote is taken”.

3. Once the balloting had been completed, the respective scrutineers of the parties signed the Board’s Certification of Conduct of Election by which they certified “that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret ballot”. The respective representatives of the parties signed the Consent and Waiver by which they consented to an immediate counting of the ballots cast in the representation vote and waived any objection as to the regularity and sufficiency of the balloting. Accordingly, the

ballots were immediately counted. Of the twenty ballots cast, ten were marked in favour of the applicant and nine were marked against the applicant. The segregated ballot cast by Domingos Ramos was not counted due to the dispute between the parties with respect to his inclusion in or exclusion from the bargaining unit. By letters dated February 3, 1981, the applicant advised the Board that it withdrew its objection to the respondent's exclusion of Domingos Ramos from the voters list and agreed with the respondent's contention that Mr. Ramos should not be included in the bargaining unit.

4. The respondent and the objectors allege several contraventions of the Registrar's direction by supporters and representatives of the respondent including Peter Dorfman, the President of the applicant trade union. They request that the Board set aside the representation vote and direct that a further representation vote be taken.

5. Mr. Dorfman was known by at least some of the employees of the respondent to be a representative of the applicant since he had distributed union leaflets to employees outside the shop during the organizing campaign (prior to the period covered by the Registrar's direction). Mr. Dorfman was also the collector on seven of the ten membership cards submitted by the applicant in support of this application. On January 30, 1981, prior to the commencement of the vote, he attended at the respondent's premises and met with Nelson Whitehead, the President of the respondent. Mr. Dorfman, who was to be a representative of the respondent for the purpose of witnessing the counting and tabulation of the ballots, asked Mr. Whitehead where he could wait while the representation vote was being conducted. Mr. Whitehead suggested that he wait in the lobby. After surveying the polling station in the respondent's lunch room, Mr. Dorfman went to the lobby in accordance with Mr. Whitehead's suggestion. About five or ten minutes after the voting began, Mr. Dorfman left his seat in the lobby and spoke through a swinging door to some of the employees who were standing in the adjacent room, waiting to enter the lunch room where the balloting was being conducted. There is no evidence concerning whether the swinging door was opened by Mr. Dorfman or by an employee, nor is there any evidence concerning what Mr. Dorfman said to them. Mr. Dorfman remained in the doorway for at least five minutes before he returned to his seat in the lobby. Mr. Whitehead and two other members of management were aware of the actions of Mr. Dorfman as they observed (from the nearby boardroom in which they were waiting during the balloting) the shadow cast on the floor by Mr. Dorfman as he stood in the doorway. Mr. Whitehead testified that he could hear Mr. Dorfman talking but could not make out what he was saying. He also testified that he could hear other unintelligible voices which he presumed to be employees responding to Mr. Dorfman. It was his evidence that the "conversation lasted five or six minutes".

6. Two of the employees who testified on behalf of the objectors saw Mr. Dorfman standing in the doorway talking to employees who were waiting to vote. Although they did not know his name at the time, the witnesses knew that Mr. Dorfman was an official of the applicant trade union since they had seen him distributing leaflets outside the plant during the organizing drive. The witnesses were too far away from Mr. Dorfman to hear what he was saying to the employees.

7. Counsel for the respondent argued that Mr. Dorfman's actions during the voting period "irresistibly raise the presumption that Mr. Dorfman was engaged in electioneering and propaganda". He further contended that Board elections must not only be carried on in a fair and reasonable manner but must also be seen to be carried on in a fair and reasonable manner.

8. Counsel for the applicant submitted that the parties seeking to set aside the election had not discharged the onus on them to prove that the Registrar's direction was breached. It was her position that there was no evidence before the Board of electioneering or propagandizing. Accordingly, she submitted that it was unnecessary for Mr. Dorfman to testify before the Board.

9. Section 92(5) of the Act provides as follows:

“Where the Board determines that a representation vote is to be taken amongst the employees in a bargaining unit or voting constituency, the Board may hold such additional representation votes as it considers necessary to determine the true wishes of the employees.”

In deciding whether to exercise its discretion under section 92(5) to direct a further representation vote, the Board's concern is whether it can rely on the vote taken on January 30, 1981 as representing the true wishes of the employees. As stated in *Armoured Floor Company Limited*, [1978] OLRB Rep. Sept. 793, at paragraph 5, “the Board has indicated the kind of climate which it considers suitable for the exercise of an individual employee's personal choice in casting his vote in *Wolverine Tube Division of Calumet and Hecla of Canada Ltd.* 63 CLLC ¶ 12,296 at 1228 wherein it refers to *Rogers Majestic Limited* D.L.S. 7-1382 as follows:

‘Its primary object is to ensure that, so far as possible, the vote will be conducted in an atmosphere of calm and that the employees who are to participate in the vote shall not be subjected to partisan pressures and influences as the voting day approaches. The Board's view has always been that at that point the individual employees should be left free to make a purely personal decision as to how he should vote.’”

10. Although Mr. Dorfman was not an employee of the respondent, as the representative of the applicant trade union for the purpose of counting and tabulating the ballots he had a legitimate reason for attending at the premises of the respondent at the time of the vote. However, the performance of that function did not require that he speak with employees who were waiting to cast their ballots. Mr. Dorfman was present throughout the hearing but he did not testify before the Board. In the circumstances of this case, the failure of Mr. Dorfman to give evidence which was within his power to give and by which relevant facts might have been elucidated, justifies the Board in drawing the inference that his evidence would have been unfavourable to the applicant's case or at least would not have supported it (see *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645, at paragraph 11, and the authorities cited therein).

11. The mere presence of one or more trade union representatives in or near the polling area will not necessarily induce the Board to set aside a representation vote and order a further vote (see *Neelon Steel Limited*, [1965] OLRB Rep. Nov. 548). However, the instant case does not involve the mere presence of a representative of the applicant; it is a case in which the highest official of the applicant trade union spoke for at least five minutes through a partially opened door to employees immediately before they cast their ballots in the representation vote. Although there is no direct evidence before the Board that Mr. Dorfman breached the Registrar's direction, having regard to all of the circumstances including the absence of any explanation by Mr. Dorfman of his conduct, the Board is of the view that it is reasonable to



infer that the direction was contravened in the present case. The Board is further of the opinion that in view of Mr. Dorfman's imprudent conduct, it cannot rely upon the representation vote as an expression of the true wishes of the employees with respect to their desire to be represented by the applicant in their employment relations with the respondent.

12. Accordingly, having regard to all of the evidence before it, the Board in the exercise of its discretion sets aside the representation vote in this matter and directs that a further representation vote be taken amongst the employees in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

13. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

14. In view of our disposition of this matter, it is unnecessary for the Board to determine whether other contraventions of the Registrar's direction occurred, as alleged by the respondent and the objectors. However, the Board wishes to note for the future guidance of the parties that a number of the objectors' allegations appear to have been based on the mistaken belief that the Registrar's direction prohibited employees from speaking or communicating in writing on any subject from midnight of Monday, January 26, 1981 until completion of the vote. This misunderstanding of the effect of the direction may have resulted from the term "silent period" which is often used as an informal description of the period covered by the direction. However, it is clear from the wording of the direction that it does not prohibit all communication among employees; it only precludes propaganda and electioneering, in order to allow employees an opportunity for reflection during a period in which they will not be subjected to persuasion.

15. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER B. K. LEE;**

1. Having read the decision of the majority, I dissent.

2. The facts as contained in the majority decision are not in dispute.

3. Regarding the applicant Union's position not to have Mr. Dorfman testify, I accept, in the circumstances of this case, the reasons put forward by counsel for the union for this determination. (see clause 8 of the majority decision).

4. There is no direct evidence of violation of the silent period or that the activities of Mr. Dorfman influenced the vote of any of the employees participating.

5. I find that the vote taken January 30th, 1981 represents the true wishes of the employees and there is no justification to order another representation vote.

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**2176-80-R; 2518-80-U** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Applicant/Complainant, v. **A. Stork & Sons Ltd., Respondent**

**Charges – Section 7a – Union losing pre-hearing vote – Establishing threat against employee by foremen – Whether isolated contravention of Act causing Board to certify without vote**

**BEFORE:** D. E. Franks, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

**APPEARANCES:** *E. G. Posen and Bob Booth for the applicant/complainant; Philip J. Wolfenden and Harvey Stork for the respondent.*

**DECISION OF THE BOARD;** April 23, 1981

1. By a decision dated February 3rd, 1981, in Board File No. 2176-80-R, another panel ordered a prehearing vote with respect to certain of the employees of the respondent employer. The vote was taken on February 11th, 1981, and the ballots were counted. In all 36 persons voted, 17 voted in favour of the applicant, 18 voted against the applicant and there was 1 spoiled ballot.

2. On February 17th, 1981, counsel for the applicant trade union, by a letter, requested the Board to certify the applicant pursuant to section 7a of *The Labour Relations Act*. On February 18th, 1981, the trade union filed a complaint under section 79 alleging a violation of sections 56 and 58(a) of *The Labour Relations Act*. In view of the fact that the two applications the certification application request for section 7a relief and the section 79 complaint arise from the same set of circumstances the Board consolidated the applications.

3. At the hearing in this matter the Board heard the evidence of three employees, Mr. Robert Pineau, Mr. William Scrimshaw and Mr. Alex Hart. Board also heard the evidence of two witnesses for the employer, Mr. Dave Libman and Mr. Joe Columbo.

4. The applicant relies on two alleged incidents to form the basis of the request under section 7a of the Act. The first involved Mr. Robert Pineau. His evidence is that the week prior to the vote, on the Wednesday, the foreman, Joe Columbo, stopped him late in the afternoon, about 5:30 p.m. or 6:00 p.m. just as he was leaving. Pineau's evidence is that the foreman, Mr. Columbo, told him that if he voted for the trade union he would be dismissed from work and further Columbo told him that he would know how he voted. Pineau's evidence is also that he was affected by this discussion with Columbo. Columbo, on the other hand, in giving his evidence flatly denied ever talking to Pineau about the vote.

5. The other incident on which the request for section 7a relief is based involves William Scrimshaw and Alex Hart. Both witnesses were together on the morning of February 9th just before work started at 7:00 a.m. in the parking lot. Their evidence is that they were approached by Columbo about the vote which was to occur on the coming Wednesday, and told that if they voted yes their jobs would be terminated. This incident was also plainly denied by the foreman, Mr. Columbo. It is to be noted that if the allegation is accepted it was clearly a breach of the quiet period imposed by the Board for the vote on February 11th, 1981.

6. The applicant's request for certification under section 7a turns completely on the

matter of credibility. From his demeanour as a witness both in direct and in cross examination we are prepared to believe Mr. Pineau in his description of the incident with Mr. Columbo. However, notwithstanding the fact that neither Scrimshaw or Hart were present when the other testified we are of the view that we cannot accept their evidence that they were approached by Mr. Columbo on the morning of February 9th, 1981. We make this finding in part of the basis of their general demeanour under oath and also as a result of serious discrepancies in their evidence under cross examination. These discrepancies were emphasized by the evidence of Mr. Libman, the bookkeeper for the respondent employer. Both Mr. Hart and Mr. Scrimshaw were quite definite that on a certain date they had left work with Paul Smith when in fact Paul Smith was not at work on that day.

7. In view of the foregoing we are only prepared to accept as fact in this matter the incident between Mr. Pineau and Mr. Columbo. We reject the evidence of Mr. Scrimshaw and Mr. Hart concerning the alleged incident on the morning of February 9th, 1981. This constitutes a single isolated incident and there is no evidence of a pattern of such conduct by Mr. Columbo or any other person on the part of the respondent. In our view this is not sufficient to warrant of the Board exercising its power section 7a, and directing a certification of the applicant without reference to the vote.

8. However, it is clear that the section 79 complaint must succeed. Mr. Columbo, on behalf of the respondent, has clearly violated sections 56 and 58(a) of the Act by threatening Mr. Pineau with loss of employment. Mr. Pineau was not terminated and did not suffer any economic hardship as a consequence of the threat. It would seem that the only appropriate remedy available to Mr. Pineau and the complainant trade union would be the posting of a Notice to Employees by the respondent acknowledging a violation of section 56 and 58(a) of *The Labour Relations Act*, together with an undertaking to cease and desist from future violations. In view of the circumstances and the evidence of Mr. Columbo that communications by the employer to the employees were made in English, Italian and Portuguese, we would also direct that the Notice to Employees be posted not only in English but also in Italian and Portuguese in conspicuous places at its place of business including all places where notices to employees are customarily posted, for 60 days following receipt hereof. The Notice is set out in Appendix A.

9. In view of the evidence of Mr. Pineau that the threat by Mr. Columbo did affect the way he voted, we are also of the view that the appropriate remedy in the present case is to order a new vote. Accordingly, the Registrar will destroy the ballots from the previous vote and will conduct another vote of the employees as directed by the Board in its decision of February 3rd, 1981.

10. The matter is referred to the Registrar.

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## Appendix A

## The Labour Relations Act

**NOTICE TO EMPLOYEES****Posted by Order of the Ontario Labour Relations Board**

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

To ORGANIZE THEMSELVES;

To FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

To ACT TOGETHER FOR COLLECTIVE BARGAINING;

To REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

THE BOARD IN ITS DECISION OF APRIL 23, 1981 FOUND THAT THE CONDUCT OF MR. JOE COLUMBO IS THREATENING MR. ROBERT PINEAU WITH DISMISSAL IF HE VOTED FOR THE TRADE UNION WAS IN VIOLATION OF SECTION 56 OF THE LABOUR RELATIONS ACT WHICH READS:

"NO EMPLOYER OR EMPLOYERS' ORGANIZATION AND NO PERSON ACTING ON BEHALF OF AN EMPLOYER OR AN EMPLOYERS' ORGANIZATION SHALL PARTICIPATE IN OR INTERFERE WITH THE FORMATION, SELECTION OR ADMINISTRATION OF A TRADE UNION OR THE REPRESENTATION OF EMPLOYEES BY A TRADE UNION OR CONTRIBUTE FINANCIAL OR OTHER SUPPORT TO A TRADE UNION, BUT NOTHING IN THIS SECTION SHALL BE DEEMED TO DEPRIVE AN EMPLOYEE OF HIS FREEDOM TO EXPRESS HIS VIEWS SO LONG AS HE DOES NOT USE COERCION, INTIMIDATION, THREATS, PROMISES OF UNDUE INFLUENCE."

THE BOARD ALSO FOUND THAT THIS CONDUCT CONSTITUTED A VIOLATION OF SECTION 58(A) OF THE LABOUR RELATIONS ACT WHICH READS:

"NO EMPLOYER, EMPLOYERS' ORGANIZATION OR PERSON ACTING ON BEHALF OF AN EMPLOYER OR AN EMPLOYERS' ORGANIZATION,

- (A) SHALL REFUSE TO EMPLOY OR TO CONTINUE TO EMPLOY A PERSON, OR DISCRIMINATE AGAINST A PERSON IN REGARD TO EMPLOYMENT OR ANY TERM OR CONDITION OF EMPLOYMENT BECAUSE THE PERSON WAS OR IS A MEMBER OF A TRADE UNION OR WAS OR IS EXERCISING ANY OTHER RIGHTS UNDER THIS ACT."

A. STORK & SONS LTD. HAS BEEN DIRECTED TO POST THIS NOTICE, TO KEEP IT POSTED FOR A PERIOD OF SIXTY DAYS AND TO PERMIT ACCESS TO THE PLANT OF TWO REPRESENTATIVES OF THE CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS FOR THE PURPOSE OF SATISFYING ITSELF OF A. STORK & SONS LTD.'S COMPLIANCE WITH THIS POSTING ORDER.

A. STORK & SONS LTD.

PER: (AUTHORIZED REPRESENTATIVE)

**This is an official notice of the Board and must not be removed or defaced.**

**This notice must remain posted for 60 consecutive working days.**

**1653-80-R Peter Muscat and a Group of Employees, Applicant, v. United Food and Commercial Workers International Union, Local P287, Respondent, v. Beef Terminal (1979) Limited, Intervener**

**Petition – Termination – Whether Board interpreting collective agreement to determine whether employees in bargaining unit – Signatories to termination petition holding shares of company – Whether precluding finding that petition voluntary**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members C. G. Bourne and B. Armstrong.

**APPEARANCES:** *E. Rovet and M. Powell for the applicant; Harold F. Caley, David McKee and Stan Henderson for the respondent; James H. Wilson and G. B. Fox for the intervener.*

**DECISION OF THE BOARD; April 24, 1981**

1. The matters herein arise from the Board's decision which issued March 6, 1981. That decision dealt with a procedural issue raised by the respondent trade union ("the union"). That issue was whether the Board could determine this application under section 49(2) of *The Labour Relations Act* before an arbitrator had decided a grievance of the union that Beef Terminal (1979) Limited ("the employer") had recalled to work a substantial number of persons contrary to the collective agreement binding upon the employer and the union, which recall followed on a six months interruption in the operations. The union had contended that the Board could not determine who were employees for purposes of the application until the arbitrator had decided the status of the recalled employees. In between the filing of that grievance in December 1979 and the filing of this application, the employer had been found by the Board, differently constituted, to be the successor employer in a sale of a business within the meaning of section 55 of the Act.

2. In its March 6 decision, the Board decided to proceed without awaiting the outcome of the arbitration. In doing so, the Board acknowledged that it might have to step into the shoes of the arbitrator and interpret the collective agreement to determine whether the employees at work when the application was made were employees for all purposes of the application but stated that it would decide that need only when it proceeded to hear the application fully on its merits.

3. When the application came on for hearing again on April 3rd, counsel for the applicant raised the procedural issue of whether the Board had jurisdiction to limit the meaning of employees as used in section 49 to mean only those persons who were properly at work when the application was made. The Board heard and considered the submissions of the parties on this issue and gave the following decision orally at the hearing.

"The Board finds that the question of whether employees have been recalled to work or hired contrary to the collective agreement is a relevant factor to be considered by the Board in determining whether, in the words of section 49(3) of *The Labour Relations Act*, it is initially satisfied that "...not less than 45% of the employees in the bargaining unit have voluntarily signified in writing...that they no longer wish to be represented by the trade union...", and if the Board is so satisfied, it is

also relevant for the Board in determining whether, in further words of section 49, "...a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated."

Similar matters were considered by the Board in its decisions in *Custom Aggregates*, [1978] OLRB Rep. March 215 and *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577.

Therefore the Board will proceed in this case to decide those issues as it becomes necessary in order to determine ultimately this application."

4. The Board then advised the parties that it would proceed to determine, pursuant to section 49(3) whether "...not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing... that they no longer wish to be represented by the trade union...". The parties were advised that there were 43 names on the list filed by the employer, 36 of which were matched by names on the petition which had been filed in support of the application. Counsel for the union, having had the opportunity by agreement of the parties to view the lists, advised the Board that the union did not challenge 17 of the names thereon. On the appearance that not less than 45 per cent of the employees on the list had signed the petition, the Board conducted its usual inquiry into the origin, preparation, circulation and filing with the Board of the petition, all subject to the union's right to challenge whether those persons who were properly at work at the time and who signed the petition constituted not less than 45 per cent of the employees in the bargaining unit.

5. The manner in which the petition came into being, the signatures obtained and the document filed with the Board, satisfies the Board's criteria for accepting such documents as being the voluntary expression of the wishes of those persons who signed it. The only question remaining as to whether the petition was, in fact, a voluntary expression of those wishes, arises from paragraph 29 in an agreement between the shareholders of the employer which states as follows:

29. As shareholders and as employees each person in Schedule "A" agrees that he will at all times do his utmost, to further the common sharehold interests and the company, and will not take part in any conspiracy or agreement for the purpose of discriminating against any other person or persons in Schedule "A" nor will he act in any way detrimental to the interests of the company, or shareholders or employees in in [sic] general, will conduct no business which shall in any way contravene the terms and provisions of this agreement.

Union counsel contends that this provision creates a legal duty of fidelity for all employees (as shareholders) of the employer, whether they are included in or excluded from the bargaining unit. In other words, all employees have committed themselves by virtue of paragraph 29 to protect the common interests of all shareholders, including those shareholders who exercise managerial functions. Since the employees have committed themselves to a collective venture in this manner, counsel contends that it is not possible for the Board to ascertain whether the petition represents the exercise of the employees' legal obligation pursuant to paragraph 29 or a voluntary expression of their wishes. Counsel reasons that, when the Board found the



employer to be the successor employer and that it must continue to recognize the union's bargaining rights and to apply the terms of the collective agreement between the union and the predecessor employer, these obligations were cast into immediate conflict with the interests of the shareholders as expressed in the shareholder agreement. In such circumstances, counsel contends, the petition cannot be seen to be a voluntary expression of the wishes of those persons who signed it.

6. The facts relevant to that issue are contained in the following sequence of events:

- (a) The predecessor employer ceased its operations in mid June 1979.
- (b) The employer herein was incorporated as Beef Terminal (1979) Limited on October 17th, 1979.
- (c) Some of the persons who had been employees of the predecessor employer entered into the shareholders' agreement referred to above effective October 20th, 1979 thereby constituting themselves as a common venture in which they were equal shareholders.
- (d) Subsequently each shareholder was taken into employment by the employer pursuant to the terms of the shareholder's agreement.
- (e) In mid December 1979, the employer resumed operation of part of the predecessor employer's prior operations.
- (f) At or about the same time as operations were resumed, the union filed its application with the Board under section 55 of the Act and its grievance under the collective agreement between it and the predecessor employer.
- (g) The Board's decision in respect of the section 55 application issued August 8th, 1980.
- (h) The applicant Mr. Peter Muscat and other employees discussed the consequences to them of the Board's decision that the employer must continue to recognize the union's bargaining rights and continue to be bound by the union's collective agreement with the predecessor employer. They decided to get rid of the union.
- (i) As a result of those discussions, Muscat obtained advice on how to proceed in an application for termination of bargaining rights, took up the petition amongst other like-minded employees and made the application which is before this Board.

7. In the Board's view, these facts reveal that the employees saw their financial interests as shareholders threatened by the continuation of the union's bargaining rights and were motivated by their concern to try and rid themselves of the union. That is what gave rise to the petition and this application. There is no evidence that the employees were motivated to act by the covenant in paragraph 29 of the shareholder's agreement, or that they put their

minds at all to that covenant for the purpose of this application or for any other purpose. The facts point overwhelmingly to the conclusion that the employees were motivated by a common wish to terminate the bargaining rights of the union and not by paragraph 29 of the shareholder's agreement. In these circumstances, the Board finds that the petition expresses the voluntary wishes of those persons who signed it.

8. It is necessary, therefore, for the Board to determine whether not less than 45 per cent of those persons who signed the petition were employees in the bargaining unit when they signed it and at all times material to this application. Therefore this application is to be continued for hearing and the Registrar is directed to list it for the earliest available date. The purpose of a hearing will be to consider the evidence and the argument of the parties in respect of whether not less than 45 per cent of the persons who signed the petition were employees in the bargaining unit at the material times and to resolve any other matters which, at the time of the hearing, are outstanding, including which persons would be eligible to vote should the Board direct that a representation vote be held.

#### **DECISION OF BOARD MEMBER B. L. ARMSTRONG;**

I am satisfied on the basis of the evidence presented that the petition submitted by the applicant is a voluntary expression of the persons who signed it. However, I wish to make it clear that this decision does not deal with the issue as to whether the applicant or the other shareholders of the company are employees who are entitled to make an application under section 49. As the majority decision notes in paragraph 8, that issue remains outstanding.

#### **1763-80-U Myrna Wood, Applicant, v. Canadian Red Cross Blood Transfusion Service, Hamilton Centre, Respondent**

**Discharge for Union Activity – Section 79 – Collective agreement excluding “temporary full-time” employees from bargaining unit but giving them certain benefits including preferential right to permanent positions – Grievor discharged without opportunity to compete for permanent position – Whether motivated by grievor’s attempt to obtain effective union representation for temporary employees**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

**APPEARANCES:** *Peter Slee and Myrna Wood for the applicant; Howard Levitt, Hector Martinez, Donald Bethune and Morris A. Blajchman for the respondent.*

#### **DECISION OF THE BOARD; April 9, 1981**

1. This is a complaint under section 79 of *The Labour Relations Act* alleging that the grievor, Myrna Wood, was discharged by the respondent because of her union activities, contrary to section 58 of the Act.

2. From April of 1977 until her discharge on November 4, 1980 the grievor was

employed as a clerk in the respondent's operations in Hamilton. She was classified as a "temporary full-time" employee assigned to perform clerk-typist's duties. The bulk of her work related to a research project into RH negative blood types conducted by Dr. Morris Blajchman, the Medical Director of the respondent.

3. As a temporary full-time employee Mrs. Wood was covered by certain provisions of the collective agreement between the respondent and The Canadian Red Cross Blood Transfusion Service Employees Association (hereinafter "the Association"). Article 2.02 of the collective agreement provides, in part:

2.02

- (a) The parties agree that upon the completion of three (3) continuous months of employment the provisions of the Agreement as specified under the Articles hereunder indicated shall apply to all persons employed on temporary full-time basis in positions included within the bargaining unit, either as authorized leave replacements, seasonal help, or for specific projects where the employee's duration of employment shall terminate upon completion or discontinuance of the project:

Article 13	—	Wages
14	—	Hours of Work and Overtime
15	—	Vacations with Pay
16	—	Statutory Holidays
20	—	Leave of Absence Without Pay
21	—	Special Leave
22	—	Marriage Leave
23	—	Compassionate Leave
24	—	Court Duty
25	—	Handicapped Employees
26	—	Welfare (except the benefit plans included in par. 26.02)
27	—	Uniforms
28	—	Sick Leave
29	—	Transportation
30	—	Meal Allowance
31	—	Lodging
33	—	Safety and Health and Employment Conditions
36	—	Position Premiums
37	—	Employee Performance Review and Employee Files

and, further, such employees shall be entitled to preferential consideration in filling up permanent full-time vacancies within the bargaining unit to which they are qualified, as against outside applicants.

The scope clause of the collective agreement expressly excludes temporary full-time employees from the bargaining unit, and in a separate decision dated February 18, 1981, (Reported [1981] OLRB Rep. Feb.137,) the Board has determined that Mrs. Wood is not in the bargaining unit and was not represented by the association at the time of her discharge.



4. The evidence establishes that Mrs. Wood paid dues to the association pursuant to a voluntary check off provision in the collective agreement. She also attended its meetings, being treated for all practical purposes as a member. Under Article 2.02(a) of the collective agreement as permanent full-time positions become available there is a right of preferential consideration which the union can enforce for the benefit of temporary full-time employees. The union's administration of that article of the collective agreement set Mrs. Wood on a collision course with the union, and more particularly with its president, Mrs. Joanne Hatfield.

5. The confrontation grew over time. It appears that there were only two other temporary full-time employees: Sylvia Martin, a clerk-typist and Debbie Allen, a driver. Mrs. Wood became unhappy with the treatment that each of her counterparts received from the employer and with what she perceived as the association's failure to properly defend them. In September of 1980 Mrs. Martin applied for a newly opened permanent position. She was refused the job. It was awarded to Christina Hatfield, a non-employee who is the daughter of the president of the union. On September 16, 1980, when Mrs. Martin learned she had been unsuccessful she asked Mrs. Hatfield why she had been denied the job. It is not entirely clear how the president of the association would have been privy to the reasons for that decision of management. In any event Mrs. Hatfield replied that the employer felt that she was better suited to the job that she was in. When Mrs. Martin related to Mrs. Wood what the union president had told her, Mrs. Wood was not satisfied. She was particularly concerned that the association's president should appear indifferent when a temporary full-time employee with past service and experience was not given preference over an outside applicant in filling a permanent position. The matter was more sensitive still because the successful applicant was the association president's daughter. Notwithstanding that Mrs. Wood decided to confront Mrs. Hatfield.

6. She proceeded to Mrs. Hatfield's office with a copy of the collective agreement. The evidence establishes that a heated discussion ensued. Mrs. Wood registered her displeasure that the association showed itself unwilling to back the temporary full-time employees by enforcing their preferential right to permanent positions under Article 2.02(a) of the collective agreement. Mrs. Hatfield responded that the hiring of someone else over Mrs. Martin was management's prerogative. She stressed that in any event this was not an issue which Mrs. Wood had any business to raise because she was not a member of the union and had no rights under the collective agreement.

7. At that point Mr. Bethune, the administrator of the respondent's Hamilton Centre entered the room. While there is some conflict as to what was then said, on balance the Board accepts the evidence of Mrs. Wood, corroborated in part by the evidence of Mrs. Hatfield, that Mrs. Hatfield then suggested that she address her complaint to Mr. Bethune. Mrs. Wood expressed to Mr. Bethune her view that Mrs. Martin should have been awarded the job on the basis of her greater experience. After they discussed the criteria for the job Mr. Bethune agreed with Mrs. Hatfield that this was not a matter which should concern Mrs. Wood because she was not a member of the union. So the incident ended, although it is clear that Mrs. Wood was less than satisfied at what she perceived as the union's failure to adequately represent the interests of the temporary full-time employees.

8. The next incident, a few weeks later, involved the termination of Debbie Allen. A temporary full-time employee of some three years' experience with the respondent, Ms. Allen

was discharged in October, 1980, while she was applying for a permanent position. Although Ms. Allen apparently chose not to pursue the matter through the association, Mrs. Wood again became concerned that the union should be doing more to protect temporary full-time employees. Her concern was shared by some permanent employees who were members of the bargaining unit. Mrs. Wood made no secret of her displeasure over the Debbie Allen discharge. She spoke with other employees, including Mrs. Laurie Hampson, about her dissatisfaction with the union's failure to do anything both for Ms. Allen and for Mrs. Martin. She decided that something must be done to make the association more responsive to the temporary employees, and to that end she prepared the following petition.

The Canadian Red Cross Blood Transfusion Service Employees  
Association  
c/o Joanne Hatfield

We would like to ask the executive of our union to call a membership meeting to discuss an important issue. The issue is: whether management has broken our contract by not giving preferential consideration on job openings to permanent temporary workers, over outsiders — article 2.02.

The union can put in a policy grievance and go to arbitration on *any* dispute over interpretation of the contract. (section 37(2) of the Labour Relations Act) The union has a duty to represent *all* employees of the bargaining unit, even if they are not official members of the union. (section 60 of the Act.)

One member has been denied a job she qualified for, and an outsider was hired. The reasons given were age, weight, etc.: criteria that has [sic] not been used in hiring other people in the past 2 years for the position.

Another member has been denied a permanent position and therefore is fired. The reasons given were complaints about her work by other members of the bargaining unit. Her supervisor assessed her work for another 3 weeks, and then, without bringing up any more complaints about her work, said that *administration* had said she could not have the job. So far, no reasonable complaints about incompetent work, refusal to work, etc. have been given her. Other people in the bargaining unit who have worked with her, have found no problems with her work.

Two temporary workers have been told that when a permanent position is posted, it will be 'advertised' outside. This seems to imply prior intent to circumvent article 2.02 of the contract.

As the permanent temporaries are not allowed to be members of the union they can not grieve on their own behalf. However, we feel that since management signed this contract, and since we have supported the union (and paid union dues for years), that it is the union's responsibility to grieve this issue. As we decided over the last negotiations, if we do not stand up for our union and the contract we will eventually lose all we have gained.

9. There was some conflict in the evidence as to how widely and for how long the petition was circulated. On balance we must conclude that it was seen by only a handful of employees. Mrs. Wood did not herself circulate the petition, but gave it to permanent employees to circulate, in the belief that her standing to complain would again be questioned if it were known that she was its sponsor. The permanent employees who had it returned it to her after little more than a week. It is clear that while not many employees saw the actual petition its existence was fairly widely known. It was also widely known that it related to unhappiness about the treatment of both Mrs. Martin and Debbie Allen, two issues that were becoming a matter of growing discontent among the employees.

10. Mrs. Hatfield, the union's president, was away from work on sick leave during the time that the petition was in the workplace. She learned of the document while at home through a telephone call from an employee. While Mrs. Hatfield testified that she did not know who the author of the petition was, she admitted that she knew it related to the treatment of Debbie Allen and Sylvia Martin. When she returned to work on November 3, 1980 she learned from one of the association's officers that Laurie Hampson and Myrna Wood were particularly upset about the discharge of Debbie Allen and the failure of Mrs. Martin to obtain the permanent job that she had applied for. Almost immediately Mrs. Hatfield sought out Mrs. Hampson at her workplace.

11. There is a great difference in the account of Mrs. Hampson and of Mrs. Hatfield as to what was said between them. Mrs. Hampson testified that the president was angry, jabbed her finger at her and told her in an annoyed tone of voice that she did not know the facts and that the incidents regarding Debbie Allen and Sylvia Martin did not concern her. By Mrs. Hampson's account the purpose of Mrs. Hatfield's speaking to her was to tell her to stop complaining and to stay out of things that did not concern her.

12. Mrs. Hatfield's account is entirely to the contrary. According to her evidence she approached Mrs. Hampson and asked her what the nature of her concerns were about Debbie Allen and Mrs. Martin. The union's president testified that she sought to help Mrs. Hampson understand what had happened. She says that she explained to her that Ms. Allen had been terminated because of a general dissatisfaction with her driving abilities and that Mrs. Martin was not given the permanent position because it was management's opinion that she was better suited to the clerical job that she already held.

13. The exchange between Hampson and Hatfield was observed by Mrs. Lorraine Leroux, a witness called on behalf of the respondent. While Mrs. Leroux testified that she did not believe that Mrs. Hatfield was angry, her account supports at least in part the testimony of Mrs. Hampson. According to Mrs. Leroux, Joanne Hatfield did not give Mrs. Hampson any explanation about the decision not to transfer Mrs. Martin to a permanent job. Mrs. Leroux's evidence is that Mrs. Hatfield told Mrs. Hampson that the reasons for management's decision were confidential. For reasons that will become apparent, the credibility of Mrs. Hatfield's testimony is critical to this complaint. After close scrutiny of the evidence of all three witnesses to the exchange between Hatfield and Hampson we must prefer the evidence of Mrs. Hampson, and must also find, having regard both to her demeanour as a witness and to the content of her evidence that Mrs. Hatfield was less than candid in her testimony. Whatever may have been her tone of voice in addressing Mrs. Hampson, we must find that Mrs. Hatfield's purpose in approaching Hampson was essentially to scold her and to instruct her



that she should stay out these matters and not, as Hatfield maintained, to try to satisfy Mrs. Hampson's concerns.

14. A similar exchange then occurred between Mrs. Hatfield and Mrs. Wood. The Board is satisfied upon the evidence that the purpose of Mrs. Hatfield's going to Mrs. Wood was to admonish Mrs. Wood for having caused dissension among the employees over Allen and Martin and to tell her to stop meddling in union affairs. While there may be some doubt as to how loud their exchange was, it is clear that it was an intense confrontation. The Board accepts the evidence of Mrs. Wood that during their encounter Mrs. Hatfield told the grievor that she was aware that Mrs. Wood had been stirring trouble about the termination of Debbie Allen and that she was going to raise it with Dr. Blajchman the next morning.

15. The unchallenged evidence is that the next morning Mrs. Hatfield met with Dr. Blajchman and Mr. Bethune and informed them of the petition and the morale problems developing among the employees in respect of Debbie Allen's discharge. Later that same day the grievor was discharged.

16. Mrs. Wood was discharged by Dr. Blajchman, with Mr. Bethune and Mrs. Spiak, the supervisor of laboratories, both present. While there was some conflict in the evidence over what was said in the termination meeting, it is clear that Mrs. Wood was told that she was being terminated because the funding for her position had run out. The Board does not doubt the truth of the respondent's assertion that it became aware in October of 1980 that funding would no longer be available for Mrs. Wood's position and that her job would no longer continue as the RH negative research project was complete. The issue, however, is whether those were the only reasons for her discharge and whether there were alternatives to discharge which the respondent did not pursue because of an unlawful motive.

17. The uncontradicted evidence is that Dr. Blajchman was pleased with the quality of Mrs. Wood's work. He had previously given her verbal assurances that he would give her first consideration for any permanent position that came open. It was then generally expected that a permanent clerk-typist position occupied by a Mrs. Sears, an employee on sick leave not expected to return, would be coming open and that Mrs. Wood and Mrs. Martin would both be candidates for that job. They had both been told earlier that there might only be one job for both of them. When it became clear that further funding for Mrs. Wood's job would not be forthcoming, however, at the time of Mrs. Wood's confrontations with Mrs. Hatfield, the respondent apparently ceased to treat Mrs. Wood and Mrs. Martin on the same plane. It simply let Mrs. Martin continue in the one remaining temporary full-time position, notwithstanding that Mrs. Wood was senior to Mrs. Martin and had performed the same kinds of job functions.

18. The evidence of Dr. Blajchman is that he had no knowledge of Mrs. Wood's efforts to make the union more militant or to redress the perceived injustice to Debbie Allen and Mrs. Martin. It appears that he responded to considerable pressure from Mr. Bethune to terminate Mrs. Wood. He acknowledged that on the morning of Mrs. Wood's discharge he learned from Mrs. Hatfield that a petition was abroad and that there was discontent over the employees about Debbie Allen's termination. He testified, however, that he was not told of Mrs. Wood's involvement with either of those things and that he viewed her simply as a good employee who was being let go because of budgetary constraints.

19. The events immediately surrounding the grievor's discharge, however, are not consistent with that explanation. It appears that upon termination it is the respondent's normal practice to give employees two weeks' prior notice, allowing them to work out that time prior to their departure. That is what was done for Debbie Allen. When Mrs. Wood was advised of her discharge, however, she was told that it was effective immediately. She was given two weeks' pay in lieu of notice and was told by Mr. Bethune that she must be off the employer's premises by one o'clock the same day. That is not the kind of parting normally expected when a praiseworthy employee of long service is being let go because of a budgetary problem.

20. The evidence establishes that it was decided as early as the week prior that Mrs. Wood would not be allowed to work out a two week notice period. In light of that, and on the totality of evidence regarding the grievor's discharge, the Board cannot accept the evidence of Mr. Bethune that he was unaware of Mrs. Wood's efforts to infuse some militance in the association or of the antagonism between herself and the association's president, Mrs. Hatfield. We are satisfied, on the balance of probabilities, that he had that knowledge and that it was instrumental in his urging Dr. Blajchman to terminate Mrs. Wood without giving her the right to compete for the one remaining temporary job he responded to an employee's effort to gain effective representation by a trade union. That is a right protected by section 58 of the Act. We must therefore find that the respondent's termination was in breach of that section.

21. We turn to consider the appropriate remedial order. On the evidence the Board must accept that funding for Mrs. Wood's position has ended. It is also clear that the temporary research task for which she was hired is concluded. While it is not clear how long she would have worked but for the respondent's unlawful motivation, it is at least probable that Mrs. Wood would have had a fair chance to compete with Mrs. Martin for the temporary job which she now holds and for preferential consideration on any permanent job that might arise in the future, as indicated by the prior statements of Dr. Blajchman.

22. While no precise measure of redress can be determined, we are satisfied that the grievor can be adequately compensated. The Board therefore orders that the grievor be paid forthwith her wages and benefits lost from the date of her discharge to the date of this order, and that she be given written notice of the next five openings for a permanent position with the respondent. If she should apply for any such position for which she is qualified she shall have the right of preferential consideration over any applicant who is not an employee of the respondent. The Board does not consider a posting order to be necessary in the circumstances of this case.

23. The Board shall remain seized of this complaint in the event of any disagreement between the parties respecting the interpretation or implementation of this decision.

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**2076-80-U International Association of Machinists and Aerospace Workers, Complainant, v. City-Wide Scale Co. Ltd., Respondent.**

**Discharge for Union Activity – Section 79 – Allegation that grievor discharged for union activity – Employer establishing several acts of misconduct by grievor – No direct evidence that employer knew of grievor's union activity – Whether Board inferring knowledge from circumstances**

**BEFORE:** C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and B. Armstrong.

**APPEARANCES:** *Joyce Holden for the complainant; D. K. Robinson and L. Paul LaLonde for the respondent.*

**DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER H. J. F. Ade; April 10, 1981**

1. The names: "The International Ass. of Machinist & Aerospace Workers" and "City-Wide Scales Company Ltd." appearing in the style of cause of this complaint are amended to read: "International Association of Machinists and Aerospace Workers" and "City-Wide Scale Co. Ltd.".
2. This a complaint under section 79 of *The Labour Relations Act* which alleges that the grievor, George Jack, was dealt with by the respondent contrary to several provisions of the Act. At the hearing the complainant narrowed its complaint to the allegation that the grievor was discharged by the respondent because of his involvement with the complainant trade union. Such conduct on the part of the respondent would amount to a violation of section 58 of the Act.
3. The grievor is a scale service mechanic. He commenced working for the respondent in January of 1978, and was discharged on December 22, 1980.
4. Mr. L. Paul LaLonde, the owner of the respondent, testified that he decided to discharge the grievor because of a number of acts of misconduct on his part. The first of these occurred in March of 1980 when the grievor was involved in a relatively minor accident with a company vehicle. The grievor waited several days before reporting the accident and only did so after the respondent had begun to question employees about how certain damage had occurred to the vehicle. The grievor testified that he had been unaware of the fact that the respondent had been asking about the vehicle when he reported the accident, although on cross-examination he conceded that his action in personally paying the cost of towing the vehicle out of the ditch may in part have been motivated by a desire to "cover up" the accident.
5. On July 14, 1980, the grievor and an apprentice working under him, Mr. B. Mallyon, began to drink alcoholic beverages on their lunch break and then spent the entire afternoon drinking. Because of his liquor intake, the grievor had to be driven home by the apprentice. Shortly after this incident, Mr. LaLonde advised the grievor that he was considering discharging him. However, in the end the grievor was only given a verbal reprimand along with a warning from Mr. LaLonde that if this type of conduct occurred again he would be discharged.



6. On or about October 16th, the grievor went to workmen's compensation and never again returned to active employment with the respondent.

7. On November 3, 1980, Mr. LaLonde was sent a notice by the respondent's insurance agent which read as follows:

Regarding your driver George Jack, he has accumulated 6 speeding tickets in the period between 10/26/78 and Mar. 25/80. Also had his licence suspended for unpaid fine 6/30/80. This will mean a raise in Ins. rates on the vehicle he drives.

8. Mr. LaLonde testified that on the basis of this note, he had concluded that the grievor had been driving a company vehicle while his licence was under suspension. In fact, however, the grievor's licence was reinstated on July 2, 1980 and during the short period of its suspension the grievor had not driven a company vehicle.

9. The insurance agent's note to Mr. LaLonde indicated that the insurance premium on the vehicle driven by the grievor would be increased. Mr. LaLonde was later advised by telephone that the increase would be in the order of sixty per cent. In July of 1980, Mr. Hammond, the respondent's shop manager, had indicated both to the grievor and to another employee, Mr. James Peacock, that the respondent was concerned about the number of speeding tickets that both of them were accumulating. However, the notice from the insurance agent on November 3, 1980 referred only to an increase in the rate for the vehicle driven by the grievor.

10. Mr. LaLonde testified that on the basis of the notice from the insurance company and the previous events involving the grievor, he came to the conclusion that the company and the previous events involving the grievor, he came to the conclusion that he did not want the grievor working for the respondent. Mr. LaLonde testified that he took no action at the time because the grievor was off work on workmen's compensation and further, since he had removed all his tools, uniforms and books from the respondent's premises, Mr. LaLonde felt that the grievor did not intend to return to work. On December 19, 1980, Mr. LaLonde was advised that the grievor would be returning to work and later that day he had a letter of discharge prepared which referred to the matters set out above.

11. After the letter of discharge had been prepared, Mr. LaLonde discussed the grievor with Mr. Peacock. Mr. Peacock advised Mr. LaLonde about an incident in July of 1980 when the grievor and Mr. Mallyon, the apprentice, had been sent to perform some work at the premises of a brewery which is one of the respondent's major customers. While there, the grievor over Mr. Mallyon's objections, emptied the tools from one of Mr. Mallyon's tool kits and filled it with approximately twenty cans of beer. The grievor then placed the tool kit in his company vehicle and continued with his work. As it happened, Mr. Peacock's truck had broken down and he came to the brewery to borrow the grievor's vehicle which he drove out of the brewery's premises to another job. Mr. Peacock later discovered the beer in the vehicle and became quite upset when he considered what might have happened if he had been caught with it. Mr. Peacock advised the shop manager, Mr. Gary Hammond, about the incident, but Mr. Hammond apparently neither took any disciplinary action against the grievor nor advised Mr. LaLonde of what had occurred. Mr. LaLonde, in giving his testimony, indicated that this matter was in his mind at the time he discharged the grievor.

12. On December 22, 1980, the grievor arrived at the respondent's premises prepared to work. He was, however, handed the letter of discharge prepared by Mr. LaLonde on December 19th.

13. Mr. LaLonde testified that the discharge of the grievor had nothing to do with his support for the applicant union and that, indeed, at the time he had been unaware of any involvement on the part of the grievor with the complainant. Mr. LaLonde noted that at the relevant time the grievor had been off work on workmen's compensation and added that at the time he had been under the impression that another employee, Mr. R. MacKillop had been the employee most actively involved with the union.

14. The grievor testified that prior to his going off work there had been some general discussion among the employees about being represented by a trade union, and that after he went on compensation he and five other employees agreed that the grievor should set up a meeting between the employees and representatives of the complainant trade union. Such a meeting was in fact held on October 23, 1980. At this meeting all of the employees present signed union cards. Following the meeting, the grievor offered to serve as a continuing liaison between the employees and the union. There is, however, nothing in the evidence to indicate any concrete involvement by the grievor with the complainant apart from organizing the meeting on October 23, 1980.

15. The complainant filed its application for certification on October 27, 1980. Shortly thereafter at a regular meeting of employees, Mr. LaLonde raised the matter provided to him by the Canadian Manufacturers Association. During the meeting, Mr. MacKillop openly identified himself as a union supporter and criticized Mr. LaLonde for the respondent's spending priorities. On November 14, 1980, the Board held a hearing into the complainant's application for certification. The grievor did not attend at the hearing. Mr. MacKillop, however, attended with the representatives of the union.

16. As already indicated, Mr. LaLonde testified that he had no knowledge of the grievor's involvement with the complainant trade union. There is no direct evidence before us to show that he did have any such knowledge. In the appropriate case, the Board is prepared to infer employer knowledge of an employee's union activity, particularly where the employer's conduct towards that employee appears to be unduly harsh, discriminatory or unusual in all of the circumstances. In the instant case, however, we are not prepared to infer such knowledge. Not only was the grievor away from work on compensation during the complainant's organizing campaign, but another employee, Mr. MacKillop, openly identified himself as an active union supporter and attended with representatives of the union at the certification hearing. The respondent took no action against Mr. MacKillop. In addition to this, the respondent came forward with a not unreasonable explanation for its decision to discharge the grievor, an explanation free of any anti-union considerations. In all the circumstances, we are satisfied that the respondent has met the onus placed on it by section 79(4a) to show that in discharging the grievor it did not act contrary to *The Labour Relations Act*.

17. The complaint is accordingly dismissed.

#### **DECISION OF BOARD MEMBER B. L. ARMSTRONG;**

1. I dissent.

2. Section 79(4a) of *The Labour Relations Act* has the effect of placing a heavy evidentiary burden on the employer in cases where it is alleged that there has been a discharge for union activity. Not only must the employer satisfy the Board on the balance of probability that there is a legitimate reason for discharge — it must also satisfy the Board that there is no other less legitimate reason for the discharge. The Board enunciated these principles in the case of *The Barrie Examiner* [1975] OLRB Rep. Oct. 745 at p. 749:

...the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts — *first*, that the reasons given to the discharge are the only reasons and *second*, that these reasons are not tainted by anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

3. The majority in the case at hand has not, in my view, applied these principles to the evidence which has been presented. The grievor was a key figure in the Union's organizational campaign. In fact, a very few days after he went on compensation, the grievor was responsible for holding a meeting between certain employees and representatives of the complainant union. The grievor also offered to act as a continuing liaison between the Union and the employer.

4. The majority has refused to infer that management had knowledge of the grievor's union activity. The apparent reason for this refusal is the fact that Mr. MacKillop, a known union supporter, was not interfered with in any way by the employer. It is safe to say, however, that it would have been very difficult to take any action against Mr. MacKillop, if only by virtue of the fact that his union sympathies were made a matter of common knowledge. The grievor, I submit, was in a more vulnerable position, and the fact that Mr. MacKillop was not penalized for his union activities does nothing to discharge the burden which the employer must discharge. The chairman also noted that there was no direct evidence before the Board to show that the employer had knowledge of the grievor's union activities. I find this to be blatant transferring of the burden of proof to the complainant, and would suggest that there is an obligation on the employer to prove that in fact he was unaware of the grievor's activities. In the absence of strong evidence to the contrary, I would infer that the employer was aware of these activities.

5. An examination of the employer's reasons for the termination, and the time the termination took place, reveals, in my respectful submission, an attempt to legitimize an action which was taken for entirely different reasons. Perhaps certain of the reasons would appear more convincing absent the inescapable inference that the stated reasons were merely "thrown together" for the occasion.

6. I would have reinstated the grievor, making him whole for any loss suffered by reason of what I find to be the unlawful discharge.

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**1483-80-M Canadian Union of Public Employees Local 1007,  
Applicant, v. Corporation of the Township of West Lincoln, Respondent.**

**Employee – Section 95(2) – Whether- “Supervisor in the Water and Sewer Department”  
“Arena Manager” and “Building Inspector/Zoning by-law Enforcement Officer and Administrator”  
exercising managerial functions – Criteria for exclusion reviewed and applied**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

**DECISION OF THE BOARD;** April 21, 1981

1. This is an application under section 95(2) of *The Labour Relations Act*. A question has arisen between the parties concerning the “employee status” of Gary Ricker, Erhard Kern and Lorne Nelson who occupy the positions, respectively, of: “supervisor” in the water and sewer department, arena manager, and “building inspector/zoning by-law enforcement officer and administrator”. The respondent employer contends that these employees exercise managerial functions and accordingly, cannot be considered “employees”, under *The Labour Relations Act*. The parties seek the opinion of the Board with respect to this matters. The relevant provision of *The Labour Relations Act* is as follows:

- 1(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,
- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or members of the bargaining unit. Collective bargaining, by its very nature, requires an arm’s length relationship between the “two sides” whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor the employer and its management team, need be concerned that its members will have “divided loyalties”. This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*[1974] 1 CLRBR at page 3:

“The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm’s length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority

directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem is securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it."

3. *The Labour Relations Act* does not contain a definition of the term "managerial functions", nor are there any specific criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called "first line" managerial employees, the important question is whether the individual can significantly affect the economic lives of his fellow employees so that he is inevitably put in a position that creates a conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases, or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision making may have a less direct or immediate impact on bargaining unit employees, the Board has focussed on the degree of independent decision

making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the result in every situation, and in assessing each case, the Board must have due regard to the nature of the industry, the nature of the particular business, and the individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose formal authority appears to be limited, but nevertheless make recommendations affecting the economic position of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this kind of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would also raise the kind of conflict of interest which section 1(3)(b) was designed to avoid.

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. If managerial functions are not actually exercised, neither a "managerial" job title nor a purported "managerial" job description are likely to be given much weight. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to actual managerial authority exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will frequently have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced personnel will commonly supervise the work of those who are less experienced, and it is part of their normal job functions to train and direct such persons, and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required; and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) (and must therefore be excluded from the ambit of collective bargaining) - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379, as follows:

"Most of the persons in dispute have more than one function and



generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall Case* above referred to, titles alone are not much assistance in determining what a person's functions really are.

While the cases cited above would seem to indicate that while a person may have minor supervisory function or very limited confidential function in matter relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should not be excluded from collective bargaining by reasons of section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining."

6. The present case does not raise any novel question of law, nor are the facts especially complicated. The task facing the Board is simply to weigh the factors which point in one direction against those which point in the other, and assess the evidence in light of the statutory purpose which section 1(3)(b) was designed to accomplish. It will be convenient to deal with each of the employees separately.

7. Gary Ricker, the "water supervisor", has held his position since 1976 and reports to

Charlie Street, the water and sewer department “superintendent”. There are three individuals working in the department: Ricker, Street, and a sewer operator. If the applicant is correct in its contention, in this particular department there are more “managers” than there are “employees”.

8. The functions of the department, as its name might suggest, include the operation of a water and sewage plant. When asked to describe his daily duties, Ricker indicated that these included pumping water, maintenance, repair of breaks in water mains, installation of mains and meters, and meter reading. All three employees are engaged in these activities. Ricker estimated that about eighty per cent of his duties were of a “physical nature” and twenty per cent were “clerical”. There is little to distinguish his principal activity from those of the sewer plant operator, and it is clear that such supervisory responsibilities as he may exercise are ancillary to his principal responsibilities. Indeed, his relationship with the operator does not differ significantly from that of most senior employees, who commonly have some limited role co-ordinating and directing the work of less experienced personnel (see paragraph 5 above).

9. Much of the evidence from which one might infer managerial authority was given in response to entirely hypothetical questions. Ricker testified he could impose discipline if the superintendent was not available, although no one had expressly so advised him and he merely assumed he had this authority because he was the senior man. He has never in *fact* disciplined anyone, and was unsure whether he could give a written warning without consultation with Street. He has never recommended a wage increase. He has never conducted an evaluation of other employees, and the decision to fill a vacancy, he testified, would be made by Street - although he *might* be consulted, *might* make recommendations, and those recommendations *might* be acted upon. He could not recall concretely whether any such discussion had occurred with respect to the sewer operator currently employed. In the event of a possible lay-off within the department, he assumed that he would discuss the matter with Street although, again, the occasion has never arisen.

10. Ricker’s benefits and working conditions do not differ significantly from those of the bargaining unit employee within the department. Ricker occasionally sits on what he described as management meetings if Street is not available, but in those instances when he has done so he has never had occasion to discuss problems within his area, has never made suggestions about running the department, and has no knowledge of any discussion of employer-employee relations. In the case of a department budget, he and Street consult about the matter and forward their needs and requests to higher levels of management. The evidence discloses that actual decision-making power resides elsewhere. Ricker’s influence does not appear to be decisive, nor is it evident why the making of a request for new equipment, building maintenance or repair should be considered a “managerial function”. It was clear that Ricker was unaware of the details of, and played no significant part, in the budget making process.

11. Ricker has certain limited authority to grant casual time off and perhaps to authorize overtime if circumstances require it. In Street’s absence, he may even call in an outside contractor if he and the other operator are unable to cope with a problem. However, on balance, we are satisfied that his authority to act independently is highly circumscribed. In our opinion, Ricker does not exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*.

12. Erhard Kern has been the “area manager” for more than five years and reports to

the chairman of the arena board. The difficulty faced by the Board in assessing his position is the paucity of evidence respecting his duties and responsibilities, or the operation of the arena itself. It appears that that operation involves six part-time employees engaged in resurfacing the ice, clean-up, and repairs. These employees work on a rotating shift basis on evenings and week-ends. Kern selects and trains them, makes up their rotation schedule, checks on and corrects their work as required, allocates work when required and administers such discipline as is necessary. The evidence discloses one specific incident of a firing, but at another point Kern indicates that if people "do not work out" we "just have to let them go". This is his responsibility, as his hiring or replacement employees - which he does from application forms which he keeps on file.

13. Kern grants time off and approves shift changes but has not real authority over the employees' other terms and conditions of employment. They are excluded from the union's bargaining unit. They get no vacations. They are paid the minimum wage.

14. Kern attends the monthly meeting of the arena board but only to make reports. He has no real decision-making authority nor can he commit the board to expenditures of any significance. Indeed, he has no authority over the snack bar in the arena - the employees, prices and products sold coming within the direct authority of the arena board. While he testified that he is engaged in physical rather than clerical work, the matter was not pursued and it is difficult in the absence of such evidence to make the assessment contemplated by *Falconbridge Nickel Mines, supra*. The insufficiency of the evidence however does not relieve the Board of its obligation to make a determination and it might be noted that both parties had full opportunity to cross-examine the witness and lead such other evidence as they might consider relevant. On the basis of the evidence before us, it is the opinion of the Board that Mr. Kern exercises managerial functions within the meaning of section 1(3)(b) of the Act.

15. Lorne Nelson has occupied his position for about one and half years and reports directly to the municipal counsel. He is concerned with zoning, by-law infractions, and dispensing information to rate payers. Prior to assuming his full-time position he performed the same functions on a part-time basis for some three years. He is assisted by a single clerical employee who is a "full-time" member of the bargaining unit but works with Nelson two or three days a week. There is no evidence of the proportion of his time spent in "supervisory functions" but it would appear that such supervisory functions as are exercised are only incidental to Mr. Nelson's principal responsibilities and in connection with clerical work which he asks the clerk to perform. On the other hand, his description of his authority over this clerk was not cross-examined upon and accordingly, stands uncontradicted. He has actually participated in the hiring of two previous individuals, having conducted the interview and recommended their hiring - a result which subsequently occurred. It is he who decides on the actual hours of work required and on at least one occasion about a year ago, initiated the discharge of a part-time employee whom he considered unsatisfactory. The licensing commission advised him of his authority when he first assumed his present post. There is no formal evaluation process nor does Nelson have a decisive input into the clerk's wages. His participation in other aspects of the respondent's "business" does not demonstrate managerial functions. Nevertheless, his evidence concerning his relationship with his clerk was neither contradicted nor supplemented by other evidence which might minimize the obvious inference that his inclusion in the bargaining unit could raise the very kind of conflict to which section 1(3)(b) was directed and which was discussed in paragraph 2 above.



16. On the basis of the evidence before us, it is the opinion of the Board that Lorne Nelson exercises managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*.

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**1664-80-M** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, Applicant, v. **Eagle Mountain Contracting Limited**, Respondent.

Collective Agreement – Section 112a – Union alleging respondent hiring non-union members contrary to provincial agreement – Respondent alleging misrepresentation by union as to effect of voluntary recognition agreement – Agreement on its face indicating continuation from year to year – Whether misrepresentation relieving respondent of obligations under collective agreement

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members C. A. Ballentine and J. A. Ronson.

**APPEARANCES:** *J. James Nyman and William Sherman for the applicant; D. H. Jack for the respondent.*

**DECISION OF THE BOARD:** April 22, 1981

1. The name “Eagle Mountain Contracting Limited and Eagle Mountain Contracting” appearing in the style of cause of this application as the name of the respondent is amended to read: “Eagle Mountain Contracting Limited”.

2. The applicant, United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (“the union”), has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 112a of *The Labour Relations Act*.

3. The grievance alleges that the respondent has violated the current provincial agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America by hiring persons who were not members of the union to perform work covered by the provincial agreement contrary to its terms. The respondent denies that it is bound to that agreement but, if it is wrong in that respect, the respondent admits its liability. If the respondent has liability, the parties are agreed as to the amount of damages.

4. The respondent contends that a short form agreement (“the agreement”) on which the union is relying to establish that the respondent and the union are bound to the provincial agreement is not valid. The respondent bases its contention on the allegation that the agreement was obtained by the misrepresentation of the union at the time when it was signed. The respondent contends, in the alternative, that the union has abandoned the intervening collective agreements and therefore has abandoned its bargaining rights.

5. The agreement which the respondent claims was obtained by the misrepresentation of the union was signed on behalf of the union by William Sherman, its Business Representative for the past twenty-three years and on behalf of the respondent by David A. Frederickson its owner. Their signatures were witnessed by Larry W. Huston who, at the time, was a member of the union. The respondent contends that the misrepresentations were two-fold. First the respondent alleges that Sherman represented the agreement as being for a term of one year only, when, in fact, the agreement contained a clause which provided for it to continue automatically from year to year in the event that neither party gave proper notice to the contrary. Second, the respondent alleges that Sherman assured Frederickson that the union could supply him with qualified carpenters when, in fact, Sherman was unable to supply qualified contractors from the Red Lake area.

6. All three persons who signed the document in question herein testified at the hearing into this application. Having regard to their evidence, the Board makes the findings of the fact set out hereunder.

7. The contents of the document which is at issue are as follows:

**WHEREAS:** The Union and the Construction Association of Thunder Bay negotiate and establish by agreement certain terms and conditions of employment, and

**WHEREAS:** The parties hereto desire to promote and maintain harmonious relations between the Employer and Employees:

**WITNESSETH:** That the parties hereto accept and agree each with the other to be bound by all terms and conditions contained in the current Agreement between the Union and the Construction Association of Thunder Bay, and as it may be changed or renewed from time to time by negotiations and/or by lapse of time, to the same extent as though the Contractor [the respondent] has executed such agreement as a member of the Construction Association of Thunder Bay and such terms and conditions are hereby made part of this agreement and effective on all projects of the contractor in the geographical District of Rainy River, Kenora, Thunder Bay and that part of the District of Algoma and Cochrane north of the 49th Parallel and west of the North Driftwood, Abitibi and Moose Rivers to the James including the rivers herein named.

This agreement shall be effective on date of signing and shall remain in effect for a term of not less than one year and shall continue automatically thereafter for annual periods of one year each unless either party notifies the other in writing nor less than ninety (90) days prior to the expiration date that it desire to change, add to, or amend this Agreement.

The agreement states on its face that it was entered into the first day of January 1976 between the respondent and the union. Its signing was preceded by a discussion between Frederickson and Sherman, in the presence of Huston, about the availability of qualified carpenters in the Red Lake area. Sherman told Frederickson that the union could supply all of the carpenters which he would need. He did not say they would be supplied from the Red Lake area. There was also discussion as to the term of the agreement and Frederickson and Huston both maintained that they were of the understanding from that discussion that the agreement would be for a term of one year. Sherman, on the other hand, maintains that he told Frederickson the agreement would be for not less than one year and he did so because of the requirements of The Labour Relations Act. Sherman did not point out to Frederickson that the agreement contained a duration clause which provided for it to continue automatically, a year at a time, if neither party gave the notice stipulated in the agreement. Sherman gave Frederickson a copy of the collective agreement between the union and the Construction Association of Thunder Bay, the terms and conditions of which are incorporated by the agreement, but did not review its contents with Frederickson. Each time the union's collective agreement with the association has been renewed, Sherman has given a copy to Frederickson and notified him that the respondent was bound by that agreement. On each occasion, Frederickson has denied that the respondent was bound by it. While Frederickson thinks that he did not read the agreement before signing it, he admits that he signed it voluntarily and was not under any duress or compulsion to sign it or to sign it right away. The document which he signed is a standard format used by the union to bind contractors to the union's existing collective agreements when they come into its geographic jurisdiction to perform work.

8. After the agreement was signed between the respondent and the union and during 1976, the union supplied members to the respondent. Sherman was aware later that the union was not supplying members to the respondent. Therefore, when he was in the Red Lake area he made a point of checking out jobs on which he believed the respondent might be working, but, with two exceptions, was unable to identify the respondent's presence on any of these jobs. The two exceptions were a residential building project in Balmertown and a job which Sherman described as a small repair job in Red Lake. Huston was working on the latter job and when Sherman noticed this he did not consider it necessary to pursue the matter of whether the respondent was applying the collective agreement on the job. When he visited the Balmertown job he found that the respondent had subcontracted work to a contracting partnership which was not bound to a collective agreement with the union. This led to an exchange of correspondence between the union and the respondent. The union was alleging that the respondent was in violation of the collective agreement to which it was bound with the union. The respondent was denying that it was bound to any agreement with the union. Sherman eventually signed an agreement with one of the partners doing the sub-contracting work and did not pursue the matter any further with the respondent.

9. Sherman became aware of the respondent's involvement on the project which is part of the subject matter of the instant grievance when he saw a notice in a local trade publication that the respondent had been the successful bidder on the project. This knowledge led ultimately to the filing of the grievance at hand.

10. Frederickson maintains that the union was never able to supply the respondent with qualified carpenters and, with the exception of Huston, none were available in the Red Lake area. He maintains further that he would be able to obtain qualified carpenters only if he accepted persons referred from the union's offices in Thunder Bay or Kenora. During the first



half of 1976, Frederickson attempted to obtain assurances from the union that it would be apply to supply the respondent with carpenters for a cost plus contract on which the respondent had been invited to bid. Frederickson was unable to get any commitment and, therefore, was unable to bid upon the job.

11. Counsel for the respondent argues that the agreement which Frederickson signed on behalf of the respondent was null and void because he was induced to sign it by Sherman's misrepresentations about the term of the contract and the union's ability to supply the respondent with qualified carpenters. On the first point, counsel relies on the claim that Sherman represented the agreement to have a term of one year and failed to point out its duration clause to Frederickson. While the Board is satisfied that Sherman did not point out the duration clause, the evidence does not support the claim that he represented the agreement to be for a duration of one year only. While Frederickson and Huston testified that they understood the agreement was for a one year term, it is patently clear that Sherman stated the agreement to be for not less than one year. His statement is entirely in accord with his understanding of the requirements of the Act (in this respect see section 44 of *The Labour Relations Act*) as well as being in accord with the duration clause of the agreement.

12. Sherman's failure to draw Frederickson's attention to the duration clause, when viewed in the context of Sherman having asserted that the agreement was for not less than one year and Frederickson having signed the agreement voluntarily without reading it, even though he admits that he was not under any duress to sign it right away, does not constitute misrepresentation of the document's term by Sherman. The Board finds, therefore, that the facts do not sustain the respondent's claim that Sherman misrepresented to Frederickson the true term of the agreement. Nor do the facts sustain the respondent's claim that Sherman misrepresented the union's ability to supply qualified carpenters to the respondent. Sherman did not claim that the union had qualified carpenters as members in Red Lake which it could supply to the respondent and while the respondent assumed that qualified carpenters were available only from the union's Kenora and Thunder Bay offices, there is no evidence that it made any effort to obtain carpenters for any of its jobs through these sources of the union. The only evidence is that the respondent attempted to get a commitment that the union would be able to supply carpenters for the future job on which the respondent wished to bid. There is absolutely nothing in these circumstances which convinces the Board that Sherman misrepresented the union's ability to supply qualified carpenters to the respondent and in so doing induced Frederickson to sign the agreement with the union. The Board finds, therefore, that Sherman did not induce the respondent to sign the agreement by misrepresenting to Frederickson either the term of the agreement or the union's ability to supply the respondent with qualified carpenters.

13. The facts in respect of abandonment reveal that the union at all times acted to exercise and preserve its bargaining rights created by the agreement signed with the respondent and did not abandon those rights. The union supplied members to the respondent after the agreement was signed. Sherman acted with reasonable diligence to determine if the respondent was engaged on jobs to which the union's collective agreement might apply, and when he identified the respondent's presence on a job, he either satisfied himself that there was no prejudice to the union's rights (for example, the repair job in Red Lake) or he took appropriate actions to enforce the union's right (for example, the Balmertown project and the project which is part of the subject matter of this grievance). This is not the conduct of a trade union which has abandoned its bargaining rights. By contrast, the respondent has not

produced any evidence that it has performed projects without observing the provincial agreement and about which Sherman had knowledge or, by exercising due diligence, should have had knowledge. In the result, the Board finds that the union has not abandoned its bargaining rights.

14. Accordingly the Board finds that the agreement which the union and the respondent signed to have effect from January 1st, 1976, was a valid collective agreement which established bargaining rights for the union and those rights have not been terminated by abandonment. The Board further finds that the respondent and union, by operation of the Province-wide Bargaining provisions of the Act, are bound by the provincial agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

15. In view of the apparent agreement of the parties as to the respondent's liability under the provincial agreement and the amount of damages resulting therefrom, the Board makes no findings in respect to liability or damages, but remains seized with these matters should the parties not be able to agree on them.

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**2111-80-R The Elk Lake Planing Mill Employees Association, Applicant, v. Elk Lake Planing Mill Limited, Respondent, v. Lumber and Sawmill Workers Union, Local 2995, Intervener.**

**Certification – Trade Union Status – Whether various steps to formulate union must be taken in proper sequence – Whether involvement of person perceived as closely associated with management casting doubt on voluntariness of membership evidence – Whether causing Board to dismiss application**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

**APPEARANCES:** *E. Rovet, J. Hoyles and M. Powell for the applicant; Michael Horan and Cal Millard for the respondent; Laurence C. Arnold and Norman Rivard for the intervener.*

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; April 6, 1981**

1. This is an application for certification for employees of the respondent's Mill operation presently represented by the intervener. The bargaining unit is described as follows:

All employees engaged in the Sawmill, Planing Mill, and Yard Operations of the Company, save and except foreman, persons above the rank of foreman, and office staff. For purposes of this Article, employees shall be all those employed in the job classifications set out in the Wage Schedule

attached to and forming a part of this Agreement, including those who are employed on job classifications which may be established and become part of the attached Wage Schedule during the term of this Agreement.

2. The applicant is a newly-formed employees' association, and accordingly was advised by the Board that it would be required to establish its status as a "trade union" within the meaning of *The Labour Relations Act*.

3. The respondent employer and the intervener Lumber and Sawmill Workers Union, Local 2995, have a mature bargaining relationship dating back a number of years. A lawful strike commenced in February of 1980, and that strike continues until the present. The operations of the respondent were initially halted entirely, but resumed some time in May of 1980. Certain bargaining-unit personnel, as well as other persons employed by the respondent, immediately crossed the picket line to man the Mill. From the limited evidence presented to the Board, it appears that the level of antagonism has been high throughout the strike. The company used a van and then a bus to transport personnel through the picket line, and employees at some stages remained inside the plant for full weeks at a time rather than cross the picket line on a daily basis. It is apparent that the present employees' association was formed amongst the employees who have chosen to continue working during the strike. The instant application for certification was filed in December 1980.

4. At the outset of the hearing, counsel for the intervener took the position that the Board, in the circumstances of this case, ought to treat the present application in the same way as it does an application for a declaration terminating bargaining rights. Since the effect upon the intervener is the same, and since the intervener and its supporters have no knowledge of what transpires within the Mill while they are on strike, counsel argued that the applicant should be put through a petition-type inquiry to permit the Board to be satisfied of the voluntariness of the employees' acts of forming and joining the applicant association. The Board refused to entertain the argument on the ground that no notice prior to the hearing was given that such a dramatic change in procedure was going to be suggested. In addition, the voluntariness of membership evidence is always material to the Board, so that considerable latitude is available to the incumbent trade union, if only in cross-examination, to pursue this line of inquiry when the applicant is establishing its status. As the present case demonstrated, the evidence relating to trade union status and that relating to the quality of membership evidence may well be intertwined.

5. The only evidence adduced by the applicant in support of its status was given by John Sucee, an employee hired by the respondent in a maintenance capacity in July of 1979. Mr. Sucee was assigned to the respondent's Heating Plant when he began, and appears to have been described by himself and others from time to time as the Heating Plant Supervisor. He began on salary, but was changed to an hourly basis once a rate could be established. Mr. Sucee's job did not exist at the time the most recent collective agreement was negotiated, and he has never been treated by the parties as falling within the bargaining unit. It is clear, however, from the evidence of all of the witnesses, including the intervener's President, Donald Boucher, that Mr. Sucee "supervises" only the Heating Plant apparatus itself, which is physically separate from the Mill, and does not supervise any other employees. The closest that he comes to the latter, according to the evidence of Mr. Boucher, is to notify the electrician (who is also not a member of the bargaining unit) when repairs are required to the heating plant. The Board has no doubt, based on the evidence, that Mr. Sucee at no time



exercised “managerial” functions within the meaning of section 1(3)(b) of the Act. The perception by other employees of Mr. Sucee’s status, however, and its effect upon this application, is substantially more complicated, and will be examined later in the decision.

6. The evidence discloses that Mr. Sucee was one of those employees who elected to cross the picket line in May of 1980 when the plant resumed operations. He was at that time assigned to various kinds of bargaining-unit work within the Mill. Passage through the picket line was, as Mr. Sucee testified, extremely difficult. As noted, the company provided first a van and then a bus to transport employees to work, and Mr. Sucee, as a former bus-driver, was assigned to operate these vehicles. Beyond this, Mr. Sucee considered himself touched by the strike in a distinctly personal way, as all the windows in his house were broken the first night the maintenance staff returned to work. Subsequently, the garage to his home was burned to the ground, with his car inside. In all, the damage which Mr. Sucee suffered to his house and personal property, and which he attributed to the strike, amounted to some \$33,000.

7. In July of 1980, Mr. Sucee began discussing with Rejean Roy, the relief operator for the Heating Plant, the possibility of getting an injunction to at least reduce the level of picketing activity. Mr. Sucee and two employees in the bargaining unit, Gil Rodrigue and Maggie Champion, attended the office of John Hoyles, a solicitor in New Liskeard, in this regard, but were advised that this was a matter for the company. Mr. Rodrigue then raised the possibility of the employees forming their own trade union, and Mr. Hoyles suggested they return to the Mill and ascertain how many of the employees would favour such a move. Mr. Sucee and the others did so, and found widespread support for the idea. Mr. Sucee advised Mr. Hoyles of this, and a meeting was arranged for the evening of August 7th, at the New Liskeard Town Hall. The meeting was announced to employees on the bus, by Mr. Rodrigue, one morning before the bus entered the company premises. There were no members of management on the bus at the time.

8. At the meeting on August 7th, Mr. Sucee introduced Mr. Hoyles, and Mr. Hoyles explained the purpose of the employees’ association and handed out copies of the proposed constitution. After going over the constitution, Mr. Hoyles asked how many employees were in favour of joining the association on the basis of the proposed constitution, and all present indicated their approval. Each of the employees then signed an application for membership and paid their dollar. These represent the bulk of the cards submitted with this application. Officers were nominated and elected by secret ballot. The constitution was then ratified, and a resolution passed authorizing an application for certification.

9. The intervener asks the Board to decline to grant status to the applicant on the grounds that both the election of officers and the applications for membership preceded the formal ratification of the applicant’s constitution, and were not confirmed afterwards, and cites in support a number of early cases decided by this Board. The Boards as early as the *Hotel Dieu Hospital* case, [1969] OLRB Rep. June 367, however, began to adopt a principle of “simultaneous occurrence”, where, as here, the various steps necessary for the formation of a trade union took place at one and the same meeting. The Board’s sole task is to ascertain whether the applicant is a “trade union” within the meaning of section 1(1)(n) of *The Labour Relations Act*. (See *CSAO National (Inc.)*, (1972) 2 O.R. 498 (C.A.); *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797; *Canteen of Canada*, [1978] OLRB Rep. Sept. 802.) So long as the intention and understanding of the particular parties is free from doubt and the necessary steps are taken to make the organization viable, the Board does not

become unduly concerned over the precise sequence in which the steps are carried out. This would appear to make good industrial-relations sense, and avoids the sort of “chicken-and-egg” analysis now urged by the intervener. Contrary to the submission of the intervener, the Board finds nothing in the amended definition of “member” in section 1(1)(j) of the Act which in any way restricts the Board to this approach.

10. In the present case, all of the employees present at the meeting of August 7th indicated their willingness to join the new association specifically on the basis of the proposed constitution, and then did so. That constitution sets out as its objects:

### **ARTICLE 3 - Objects**

The prime objectives of the Association are as follows:

1. to serve the best interests of the employees, both with the Mill and among themselves and to regulate the relations between the employees and the Mill;
2. to organize all employees of the Mill who are not in supervisory positions, to settle disputes between employees and the Mill either through agreements procedure, mediation, conciliation or arbitration;
3. through the Bargaining Committee or any other committees authorized for the purpose to conduct negotiations between the Mill and the employees to achieve and maintain a high standard of living and security.

Officers were then elected and authorized to proceed with the present application for certification. The Board on the evidence finds no reason to deny the applicant “trade union” status based on the manner in which its organizing meeting was conducted. The Board finds that the applicant is a “trade union” within the meaning of section 1(1)(n) of the Act.

11. In the alternative, the intervener argues that the applicant must be denied status as a trade union on the basis of section 12 as well as section 56 of the Act, essentially because of the involvement of Mr. Sucee in the applicant’s formation. Those sections provide:

12. The Board shall not certify a trade union if any employer or employer’s organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

56. No employer or employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his

views so long as he does not use coercion, intimidation, threats, promises or undue influence.

12. Mr. Sucee was a forthright and credible witness, and indicated that management, as far as he was aware, was given no knowledge of the organizing activities of the applicant. Mr. Sucee testified in fact that he had asked permission to borrow the company's bus the night of the organizing meeting in New Liskeard, without disclosing his purpose, and was refused. Mr. Millard, the plant manager, also was a candid witness, and testified that he became aware of the existence of the applicant only well after the fact, as a result of an indirect query by an employee who was opposed to joining any union. The evidence further fails to establish that any of the employees involved with the applicant, including Mr. Sucee, exercise managerial functions within the meaning of section 1(3)(b) of the Act. In short, there is no evidence that anyone who was in fact a member of management either directly or indirectly supported or participated in the formation of the applicant. It might be noted that as far as membership alone is concerned, eligibility for membership in the applicant is restricted by its constitution as follows:

All employees who are not employed in a managerial, supervisory, or confidential capacity who sign an application for membership shall be eligible for and shall be admitted to membership in the Association subject to acceptance by the Executive Board of the Association.

Thus even the inclusion as a member of an individual ultimately found to be "managerial" would not necessarily affect the actual "status" of the applicant (see *Children's Aid Society*, [1976] OLRB Rep. Nov. 651), so long as that individual was expelled from membership once his status was determined.

13. The difficult question before the Board is the perception which other employees would have had of Mr. Sucee's relationship to management, and the effect that that perception would in turn be likely to have had upon the voluntariness of the applicant's membership evidence. As the Board stated in *St. Michael Shops*, [1979] OLRB Rep. April 346:

...In an application for certification the Board relies on hearsay evidence in determining the membership support of an applicant union. It is not feasible for the Board to hear from each individual who signed a card to ascertain his true wishes or inquire into the circumstances under which he signed a membership card. For this system to operate effectively the Board must consider any substantial allegation which might cause the Board to doubt the reliability of the membership evidence.

14. While Mr. Sucee, as noted, was never treated as a member of the bargaining unit, the evidence falls short of establishing that his exclusion was the result of a general understanding or perception that he was "managerial". Rather, the basis for this, according to the available evidence, appears to relate to the unwritten exclusion from the coverage of the collective agreement of various types of "maintenance" personnel, which is the type of function Mr. Sucee was hired into. Neither Mr. Millard, the plant manager, nor Mr. Boucher, the intervener's president, were involved in the original negotiation of this exclusion from the production unit, and neither purported to have any clear understanding of its basis. Mr. Boucher himself could say little more than that an agreement had been reached, prior to his



time, that certain maintenance personnel were not “covered within our jurisdiction”. Both millwrights and electricians came to be excluded under this agreement, and there is no dispute that the electricians, at least, were never considered managerial. Mr. Millard appears to have elected to take advantage of the same flexibility with regard to the new position occupied by Mr. Sucee by retaining it as a staff (non-unit) position. The evidence relating to Mr. Sucee’s exclusion from the bargaining unit does not, therefore, provide the Board with any significant guidance as to how Mr. Sucee was generally perceived.

15. Similarly, the Board is not persuaded that the action of Mr. Sucee in crossing the picket line from the beginning, or his assignment to drive the company vehicles, given his qualifications and prior experience, would cause employees to view Mr. Sucee as managerial. Nor does the Board regard Mr. Sucee’s alleged protestation that he was a supervisor, at the time of crossing a hostile picket line, as the best evidence of either Mr. Sucee’s or other employees’ perception of his status. The real problem concerning Mr. Sucee is the fact that both he and the relief Heating Plant operator, Rejean Roy, wore white hats.

16. White hats are not necessarily *indicia* of authority in a particular plant. In the present case, however, it is clear that at least some of the employees attached significance to the wearing of a white hat. The evidence of Mr. Millard was that millwrights, for example, used to wear white hats, but he changed their hats to red when Mr. Boucher complained to him that the millwrights were behaving as if they had the right to give orders. The millwrights did, however, continue to be excluded from the unit. Mr. Millard testified that one of the more senior millwrights, Fred Pritchard, felt he had suffered some loss in status when his white hat was taken away, so Mr. Millard allowed him to keep it. Mr. Millard further testified that he probably should have changed the hat colour of Mr. Sucee and Mr. Roy in the Heating Plant at the same time as the millwrights’, but his only thought at the time, based on Mr. Boucher’s complaint, was to avoid confusion in the Mill. From all of this the Board must conclude that employees’ perception of Mr. Sucee, while not necessarily managerial, would have at least been ambiguous in nature. While it is clear on the evidence, that Mr. Sucee had no *actual* authority over employees in the Mill or was otherwise exercising managerial functions, it is difficult to quarrel with the submission of counsel for the intervener based on all of the facts enumerated in this decision that employees would reasonably perceive that “Mr. Sucee was very closely associated with Management and indeed occupied some supervisory position” (in the sense of having at least *some* responsibilities beyond those of rank-and-file employees).

17. What, then, is the consequence of this perception of the reliability or voluntariness of the applicant’s membership evidence? In determining this question, the Board must bear in mind the pivotal role which Mr. Sucee played in obtaining the membership evidence submitted by the applicant. But the Board must, at the same time, not lose sight of the full context in which the present application arises.

18. The intervener submits that whether or not Mr. Sucee was indeed “managerial”, employee perception of his status is sufficient to cause the Board to dismiss this application. The intervener cites in particular *Veres Wire Industry Limited*, [1976] OLRB Rep. July 337 as a case in support of this proposition. Whatever be the merits of that submission, *Veres Wire*

does not go that far. *Veres Wire* was a case in which the impugned individual was *in fact*, after an examination into his duties and responsibilities, found to fall on the “managerial” side of the line. That individual was the direct supervisor of the bulk of employees in the unit, and the Board noted at paragraph 7 therein: “He is a foreman in the true sense as contemplated under section 1(3)(b) of the Act” and “shown to be ‘the boss’ of a vast majority of the members of the appropriate bargaining unit”. Where, however, the individual is in fact not “managerial”, he is, *prima facie*, exercising his lawful rights under *The Labour Relations Act*, and the sole issue before the Board is whether the individual’s participation must be said to have undermined the voluntariness of the acts of others. In this regard, the Board finds the reasoning of *A. N. Shaw & Sons (Eastern) Ltd.*, [1980] OLRB Rep. Oct. 1347, to be apt. That case involved an application for a declaration terminating bargaining rights, which, incidentally, is the kind of case the intervener has urged the Board to analogize with the present one. There the petition in support of the application was originated and circulated by the working foreman, who at all times provided the only supervision of the members of the field crew which made up the bargaining unit. While the individual in that case, a Mr. Foley, was a member of the bargaining unit, he, unlike Mr. Sucee, clearly exercised significant supervisory responsibilities over his fellow employees, and in that sense stood in a special relationship both to employees in the unit and to management. The Board put the test as follows:

10. In assessing the voluntariness of the statement of desire, we are unable to accept the proposition that Mr. Foley stands in the same position as any other employee in the bargaining unit. Because of his supervisory functions, Mr. Foley’s active involvement with the statement of desire raises concerns which would not exist if he were other than a working foreman. However, we also do not believe that his involvement with the statement of desire must invariably result in a finding that it cannot be given any weight. Rather, what is required is an examination of all of the surrounding circumstances and an assessment of whether other employees would likely have viewed Mr. Foley as acting on behalf of, or with the support of management, or whether they would likely have perceived him as a bargaining unit employee seeking only to further his own self-interests.

The Board then concluded:

11. Employees would have been well aware of Mr. Foley’s supervisory role, particularly in assigning work. They would also likely have been aware of the fact that he was responsible for making reports to management concerning their work performance. It is also reasonable to assume that the other employees would have known that notwithstanding his status as a working foreman, Mr. Foley, like themselves, was a union member within the bargaining unit. The evidence does not suggest that Mr. Foley did anything to indicate to the employees that he was acting on behalf of management. To the contrary, his case in favour of terminating the respondent’s bargaining rights was based upon his view that union representation had acted to restrict the work available to himself and others. Along with the other employees he had been laid off for five or six weeks under circumstances where he felt he need not have been, and he blamed the existence of the collective

agreement for this fact. When all of these considerations are taken into account, we feel that the other employees would more likely have regarded Mr. Foley as acting in what he perceived to be in his own interests rather than acting on behalf of management.

20. In the present case, the Board is prepared to assume that the employer would welcome the instant application, and that employees on either side of the picket line would recognize this as well. From the evidence, however, it appears that management remained wholly uninvolved with the steps preceding the application, and, more importantly, that Mr. Sucee and the other organizers did nothing to suggest to employees the contrary. Mr Sucee appears to have prudently gone out of his way to avoid making his activities the subject of management's knowledge, or carrying out these activities in any significant way on company premises, so as to suggest any connection with the employer. Mr. Sucee had reasons of his own, described earlier, for taking initiatives to displace the intervener as bargaining agent, and these reasons without doubt would be well known to other employees working in this small-town Mill. In the circumstances of this case, the Board does not find that the various *indicia* relied upon by the intervener to demonstrate Mr. Sucee's "close association" with management would be such as to destroy the ability of the employees in the bargaining unit to elect on their own to join or not to join the applicant association. In fact, one could say in this case that *all* of the employees at work in the Mill had chosen in an overt way to associate themselves with management, rather than with the intervener, in choosing to work during the strike. The present situation had become polarized well before the present application was spawned, and the lines were clearly drawn.

21. Having regard to the fact that Mr. Sucee never did exercise supervisory functions over anyone and so could not have been observed by other employees doing so, to the care which Mr. Sucee took to divorce and indeed conceal the applicant's activities from management, to Mr. Sucee's own patent reasons for initiating the action that he did, to the existence of an apparently "technical" category of exclusion from the bargaining unit which would explain or at least obscure the reason for Mr. Sucee's treatment as staff, and to the visible polarization already in existence in the Mill, the Board does not conclude that Mr. Sucee would have been perceived by other employees as either a member of management, or acting at its behest (cf. *More Groceteria*, [1980] OLRB Rep. July 1033). More precisely, the Board is not persuaded that the participation of Mr. Sucee in the activities of the applicant casts such a cloud on the membership evidence before the Board as to cause the Board to discount it entirely. Rather, if the necessary forty-five per cent of employees in the bargaining unit were members of the applicant on the terminal date of this application, the Board is of the view that all employees ought to be given the opportunity to indicate, by way of secret ballot, whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

22. The Board notes that the dates of April 8 and 9 have been set aside for the continuation of this matter, as required. The sole remaining issue, however, would appear at this point to be the identification of those persons who were employees in the bargaining unit on the date this application was filed. The Board accordingly appoints an officer to meet with the parties on April 8th, and April 9th if necessary, to attempt to settle the list of employees in the unit, and, as well, if the applicant appears to enjoy the necessary forty-five per cent membership support in the existing bargaining unit, to settle the arrangements for the taking of a representation vote.



**DECISION OF BOARD MEMBER B. L. ARMSTRONG;**

1. I dissent.
  2. The majority has, in my view, placed an inappropriate emphasis on the actual nature of Mr. Sucee's position with the employer, and on the actual steps he took to keep the applicant's activities from management.
  3. It is, I suggest, clear on the evidence that Mr. Sucee has a high profile in the workplace which necessarily created an appearance of managerial status. The polarization of the employees at the time of the applicant's formation, coupled with the general perception of Mr. Sucee as being in some way managerial, could not help but create the impression that the Association was inspired or sanctioned by the employer.
  4. Since I cannot find the membership evidence in the case at hand to be voluntarily obtained, I would dismiss the application without a vote.
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**1749-80-R** United Food and Commercial Workers International Union, C.L.C., A.F.L., C.I.O., Applicant, v. **Footwear Fashions Limited**, Respondent, v. Footwear Fashions Employees Association, Intervener, v. Group of Employees, Objectors.

**Trade Union Status – Union previously certified by Board – Raising collective agreement as bar to certification application – Union not having any record of constitution, rules or membership – Whether Board declaring that union no longer exists – Effect of “presumption” of status under section 94 discussed**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and C. A. Ballentine.

**APPEARANCES:** Marilyn Nairn, Ian Reilly and Ray Cromarty for the applicant; Ronald Dickie, Scott Beech and Kevin V. Fisher for the respondent; W. R. Buchner, Bernice Smith and Connie Nicoletti for the intervener; C. Nguyen and Bernice Smith for the objectors.

**DECISION OF THE BOARD; April 10, 1981**

1. The name “Footwear Fashions Ltd.” appearing in the style of cause of name of the respondent is amended to read: “Footwear Fashions Limited”.
2. This application for certification first came to hearing before the Board, differently constituted, December 5th, 1980. That hearing was adjourned after the Board dealt with certain procedural issues. The application was continued for hearing on January 14th, 1981 before the Board as constituted herein. When the application was made, the respondent Footwear Fashions Limited (“the employer”) and the intervener Footwear Fashions

Employees Association ("the association") both raised as a bar to the application the claim that there was a current collective agreement between them which was dated so as to expire July 31st, 1981. This application was made November 12th, 1980. The applicant United Food and Commercial Workers International Union ("the union") contends that no collective agreement exists as a bar to its application because the association no longer is a trade union within the meaning of *The Ontario Labour Relations Act* and/or it is in fact under company control and domination and, as a consequence, the union contends that the Board should revoke the certificate which was issued to the association May 12, 1965.

3. The association was certified by the Board May 12, 1965. As a result, there is on file with the Board a certificate of trade union status which has been signed by the Registrar. That certificate of status is *prima facie* evidence pursuant to section 94 of the Act that the association is a trade union for the purposes of the Act. That is not to say, however, that this evidence of the association's status cannot be challenged and shown to be deficient, notwithstanding the certificate, to the extent that the Board might find it no longer to have status as a trade union within the meaning of section 1(1)(n) of the Act. See *Toronto Pattern Works Ltd.*, [1975] OLRB Rep. Dec. 911. The onus, however, is on the union to show that the association has, by its conduct, ceased to exist or has abandoned or otherwise lost its bargaining rights. See *Dutch Laundry and Dry Cleaners Ltd.*, [1968] OLRB Rep. April 45.

4. The Board has reviewed the evidence before it and makes the following findings of fact.

5. The employer and the association have signed over a period of 15 years at least four documents which are, *prima facie*, collective agreements within the meaning of section 1(1)(e) of the Act. The first of these documents is in a format common to many collective agreements and purports to have been in effect from May 1, 1969 to April 31 (sic), 1972. This document was renewed in a timely fashion by memoranda of agreement for further successive terms of May 1, 1972 to April 31 (sic), 1975; May 1, 1975 to April 31 (sic), 1980; and May 1, 1980 to July 31, 1981.

6. Employees have not received copies of the collective agreements, but it may be inferred from the evidence that, with exception of the memorandum extending the agreement to July 31, 1981, the amendments to the agreements have been reported to them. The evidence does not establish whether the officers of the association obtained a mandate from the employees prior to negotiating amendments of the collective agreement nor does the evidence reveal the nature of the negotiations which led to the signing of the agreement documents which are in evidence.

7. The association originally had three officers, but currently has only a president and a secretary. Although it is not clear when this change took place, there have been two officers since 1972. A third member has signing authority for the purpose of banking transactions. The term of office is for the duration of the collective agreement and elections are held when these terms expire. Prior to 1972, elections were called by notice posted by the president, but since that time the elections have been called by notice of meeting through word of mouth. That change took place when the incumbent president, Bernice Smith, first took office as president. Previously she had served as secretary of the association, having been elected to that office in 1969. Elections have also taken place when an incumbent officer has resigned office or left the employment of the employer. The present secretary was elected to office under those

circumstances. In the latter instance, the president called a meeting for purposes of electing a replacement secretary, asked for nominations but none were forthcoming. A week later she called another meeting and nominated Connie Nicoletti who was then elected. The only evidence of deviation from this practice is in respect of the last renewal of the collective agreement. No elections were held at that time because, according to Smith, the employer undertook to review wages with her early in 1981. There is no evidence of any constitution and Smith, who has been an officer of the association since 1969, has no knowledge of the existence of any constitution. Nor is there any other written statement which defines the duties of the association's officers and how elections of officers are to be conducted.

8. The collective agreement stipulates that all new employees shall "...be required to join the Association and pay the established dues and initiation fee.". It also provides that "...initiation fees and membership dues shall be collected by the Company on behalf of the Association by way of payroll deduction...". No individual membership records are kept by the association nor is there any membership initiation procedure. The only record of membership is an annual statement from the employer which lists the employees from whom dues were deducted during the year and the amount thereof for each employee. Beginning in 1972, the actual practice of deducting dues was altered at the association's request so that deductions were made only after employees completed three months of employment. This was done for the administrative purposes related to the association's practice of refunding the residue of its dues revenue at the end of each year. Monthly dues are \$1.00. The amounts deducted by the employer are paid directly into the association's bank account three or four times yearly, less any disbursements which have been made through the employer's accounting facilities on behalf of the association. The only expense which the association appears to have is for flowers sent to employees in hospital. At the end of each year the association retains a reserve equivalent to one month's dues for each employee and reimburses the residue to the individual members. Reimbursement is proportional to the number of months during which the employee has paid dues and each employee is advised by the president of the basis for reimbursement.

9. The association maintains no records other than those relating to its bank account. These consist primarily of the bank account passbook and an annual reconciliation statement provided by the employer which shows the amounts of dues deducted for each employee, disbursements made on behalf of the association and the net deposits to the association's bank account.

10. Meetings are held when there is a complaint or some other matter that an employee wishes to have discussed and for the election of officers, as aforesaid. No meetings have been held since January 1, 1979. It may be inferred from the evidence that the employees are advised by the association in meetings when amendments are made to the collective agreement. All meetings are held on company premises in the employees' lunchroom. No members of management attend.

11. Smith claims that, as president of the association, she has taken up complaints of employees with the employer. The only specific example in evidence is a complaint made in the latter part of 1980 by an employee who had lost her seniority. The employee pursued the complaint on the advice of a representative of the applicant and was instructed on how to proceed. She filed a complaint with Smith who took it up on her behalf and was successful in having the employee's seniority reinstated. The collective agreement provides for a more



formal grievance procedure, one which requires the agreement to be put in writing by the employee on a form supplied by the company.

12. The association does nothing to advise new employees of the existence of a collective agreement, to inform them about the deduction of dues and what the purpose of those dues are. It relied, according to Smith, on them learning about these matters in the ordinary course of events from other employees. As was stated above, the employees do not receive a copy of the collective agreement.

13. This application has been made some 15½ years following the Board's certification of the association and the Board's finding that it was a trade union within the meaning of the Act. While there is no other evidence prior to May 1, 1969, of the relationship between the association and the employer, since that date, four consecutive collective agreements have been executed. These documents are, *prima facie* proof also that the association has not abandoned its bargaining rights. Thus, for the agreement which expires July 31, 1981 not to be a bar to this application, the facts must establish that the association has ceased to exist or it has lost its bargaining rights by some means other than abandonment.

14. The facts in respect of whether the association exists reveal that there are two officers acting in the name of the association to sign collective agreement documents and administer a bank account. Dues are deducted from employees' pay in the association's name and deposited to its bank account. The association's president, Smith, has intervened recently with the employer on behalf of an employee and resolved the employee's complaint. There have been elections of officers and meetings of employees. On the other hand there is no constitution for the association and no other evidence which establishes the objects of the association, what officers it has, their responsibilities and how they are to be elected. Nor is there anything to indicate what the requirements of membership are. In short, there is nothing in evidence that there is an organization which exists because employees have banded together in a contractual relationship with each other for common purposes and objectives, one of which is the regulation of labour relations. When the Board certified the association in 1965, a prerequisite to certification was a finding that the association was a trade union within the meaning of the Act. Therefore the Board had to be satisfied on the evidence at that time that employees were contractually bound each to the other as members of the association. Whatever form that evidence took, the Board herein does not have comparable evidence which satisfies it that the same organization continues in existence today.

15. The Board's standards for determining whether an organization is a trade union within the meaning of the Act are not onerous. The Board looks for evidence that the following basic steps have been taken:

- (1) A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings;
- (2) the constitution should be placed before a meeting of employees for approval;
- (3) the employees attending such meeting should be admitted to membership;

(4) the constitution should be adopted or ratified by the vote of said members;

(5) officers should be elected pursuant to the constitution.

See *Local 199 U. A. W. Building Corporation*, [1977] OLRB Rep. July 472. Evidence that these steps have been taken, assured the Board that the organization is a viable one capable of representing the membership in collective action and in their relationships with their employer. Having regard for these relatively simple, straightforward requirements for establishing the fact that an organization is a trade union for purposes of the Act, it is not unreasonable to expect the organization to be able to maintain its constitution as some evidence of its continuing existence.

16. The absence in this case of a constitution or of any evidence which shows that there are employees who are members of the association bound together by agreement each with the other, casts substantial doubt as to whether the original organization has survived. While the existence of the four collective agreements and a bank account, the deduction of money in the name of the association as dues and Smith's activities are all factors which support the appearance that the association continues to function as a trade union, they equally could stand for a situation in which Smith is acting as agent for a group of individual employees. Even if there was a procedure by which employees applied for membership in the association, without evidence that there is a constitution, there is nothing to show the Board what it is that the employees would be joining. Of even greater importance, there is in fact nothing to show the employees what it is that they would be joining. Therefore, in the absence of a constitution for the association or any evidence that employees are bound together in the association by agreement each with the other, the Board finds that the association which previously was found to be a trade union within the meaning of section 1(1)(n) of the Act has ceased to exist.

17. There have been other decisions of the Board in which it has dismissed or upheld challenges to the *prima facie* proof of an organization's trade union status. In none of these cases did the party which was challenging that status raise an issue of whether there was an existing constitution as evidence of the continued existence of the organization and of its functioning as a trade union. In the case at hand, the union has, by its evidence that no constitution exists for the association, cast substantial doubt on whether the association remains in existence at all. In these circumstances, the onus shifts to the association to satisfy the Board that it has not ceased to exist and still functions as a trade union within the meaning of the Act. Such evidence that there is of activities which are compatible with the existence of a trade union falls short, in the absence of evidence of a constitution, of satisfying the Board to that effect.

18. Accordingly the Board further finds that the document which the association and the employer contend is a current collective agreement between them is not a collective agreement within the meaning of section 1(1)(e) of the Act and thus is not a bar to this application. In light of this finding, it is unnecessary for the Board to deal with the union's allegation that the association is dominated by the employer.

19. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at its plant in London save and except foreman and supervisors, persons above the rank of foreman and supervisor, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

20. The employer and the union disagreed as to whether two persons, Ray Cromarty and Marion Rehlinger, are to be included in or excluded from the bargaining unit described above. The employer contends that both should be excluded. Cromarty because he is a foreman and exercises managerial functions within the meaning of section 1(3)(b) of the Act and Rehlinger because she is a clerk in shipping and receiving and excluded as office staff. Consequently a Board officer has been authorized to inquire into and report to the Board on the duties of and responsibilities of Cromarty and on the community of interest, if any, between Rehlinger and other employees in the bargaining unit. That authorization is revoked and, instead, the Board will receive the evidence and argument of the parties on these issues at the hearing referred to hereunder for the continuation of this application.

21. Notwithstanding the disagreement of the parties, the Board further finds that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on November 25th, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

22. There has been filed with the Board a statement of desire ("petition") in opposition to the union containing the signatures of 30 persons purporting to be employees of the employer. Eleven of the names on the petition coincide with the names of persons who signed membership cards and whose names appear on the lists filed by the employer. Should the Board find the document to be a voluntary expression of the wishes of the employees who signed it, the petition would cast doubt on the membership support of the union such that the union would have clear support of less than fifty-five per cent of the employees in the bargaining unit. It will be necessary, therefore, for the Board to conduct its usual casual inquiry into the origin, preparation, circulation and filing with the Board of the petition.

23. This matter is referred to the Registrar to be listed for hearing to receive the evidence and argument of the parties on the duties and responsibilities of Ray Cromarty and the community of interest, if any, between Marion Rehlinger and other employees in the bargaining unit, to inquire into the petition as aforesaid and to deal with any other matters which at the time are outstanding.

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**2353-80-R** United Furniture Workers of America, AFL-CIO, Applicant, v. Deluxe Upholstery Employees Association, Respondent, v. La-z-Boy Canada Limited, Intervener.

**Trade Union Status – Whether “presence” in Ontario pre-requisite for status – Whether applicant authorized by constitution to operate in Ontario – Board deviating from Boulton decision**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** *Douglas J. Wray, Donald Riger and Dennis Allen for the applicant; Richard J. Hobson, Q. C., Eric Edwards, Doreen Schlosser and Jean Kienapple for the respondent; W. G. Phelps, David Eby and Lou Roussey for the intervener.*

**DECISION OF THE BOARD;** April 15, 1981

1. This is an application under section 54 of *The Labour Relations Act* for a declaration that the applicant acquired the rights, privileges and duties of the respondent by reason of a merger, amalgamation or transfer of jurisdiction.

2. Section 54 provides in part as follows:

“54.-(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.”

2. The intervener submitted that the applicant has no status as a trade union and that, accordingly, the application should be dismissed. The parties agreed that the Board should hear evidence and argument concerning the issue of the trade union status of the applicant to enable the Board to decide that threshold issue which, if it were decided against the applicant, would make it unnecessary for the Board to hear any evidence or argument concerning the merits of the application.

3. Mr. Donald Riger, a District Director of the applicant, testified in these proceedings on behalf of the applicant and filed with the Board a copy of the applicant's constitution. The applicant came into existence in 1939. Its constitution was first adopted at its first constitutional convention held in February of 1939 at Rockford, Illinois. The objects of the applicant, as set forth in Article II of the constitution, are:

“a) To unite in our International all workers embraced in our jurisdiction.

- b) To establish wage standards adequate to maintain a decent American standard of living for all workers in our industry.
- c) To shorten the hours of labour and improve working conditions.
- d) To reach and maintain agreements with employers as to wages, hours of labor and working conditions and to seek through such agreements to establish a maximum job and union security of members of the United Furniture Workers of America.
- e) To advance the economic, political, social and cultural interests of the workers in the industry.
- f) To aid in the adoption of laws for the economic and social welfare of all workers and to combat anti-labor legislation and fight for the repeal of anti-labor laws.
- g) To protect and extend our democratic institutions and the civil rights and liberties of all workers."

The applicant has approximately thirty thousand members and has entered into collective agreements with a number of employers in the United States of America, including collective agreements with the intervener (or its parent company) at plants in Monroe, Michigan, and in Florence, South Carolina.

4. Pursuant to its constitution, the applicant meets in biennial convention. The constitution also provides a procedure for the calling of special conventions. The most recent convention was held in Nashville, Tennessee during June of 1980. The constitution contains detailed provisions concerning the nomination and election of officers of the applicant, including the following sections of Article XII:

"Section 1. The only officers of the International Union shall be the International President, the Secretary-Treasurer, and the four Vice-Presidents. They shall be elected by the delegates at Alternate International Conventions beginning with the Convention held in 1980.

Section 2: The newly elected officers of the International shall begin their four-year-terms of office immediately upon their election at the Convention and shall continue to hold office until their successors are elected."

The constitution also provides for the nomination and election of a General Executive Board. Mr. Riger testified that the officers and the members of the General Executive Board were duly elected at the 1980 convention.

5. Although the constitution provides for the chartering of local unions, it was Mr. Riger's evidence that bargaining rights are generally obtained by the International and then assigned to a new or existing local. Thus, during organizing campaigns, employees generally first become members of the International and later become members of a local. Collective

agreements are negotiated "by the International with the local" and are signed by the International.

6. Mr. Riger works out of Grand Rapids, Michigan, and directs the applicant's mid-western regions. His responsibilities include servicing the applicant's collective agreement with the intervener (or its parent company) at its Monroe, Michigan plant. During June of 1980, the International President of the applicant assigned Mr. Riger to "cover Ontario" and to make contact with the employees of the intervener at its newly acquired plant in Waterloo, Ontario. After preliminary discussions with some interested employees and with officials of the Kitchener-Waterloo Labour Council, Mr. Riger met with some of the employees of the intervener in August of 1980. During the fall and early winter of 1980, Mr. Riger and Dennis Allen, an International Representative of the applicant, met with employees of the intervener several times at the premises of the Kitchener-Waterloo Labour Council. Since Mr. Riger's efforts constituted the applicant's first attempt to gain bargaining rights for persons employed in Canada, he also made contact with officials of the Canadian Labour Congress (the "C.L.C.") who agreed to provide the applicant with office space at its premises in Don Mills, Ontario, and to permit the applicant to use its address and telephone number. Mr. Riger also testified that Ralph Ortlieb, the C.L.C.'s Regional Director of Organization, had agreed (on the authorization of the applicant) to accept service and notices under *The Labour Relations Act* on behalf of the applicant. It was also Mr. Riger's evidence that there is an understanding between the applicant and the C.L.C. that the applicant will affiliate with the C.L.C. once it obtains bargaining rights for the employees of the intervener.

7. Mr. Riger's meetings with the employees of the intervener culminated in the signing of the following "merger agreement" dated January 16, 1981, by Mr. Riger and by persons purporting to be representatives of the respondent:

"The officers of Deluxe Upholstery Employees Association and the representatives of the United Furniture Workers of America, AFL CIO, hereby agree that the vote held this day, January 16, 1981 at the Kitchener-Waterloo Labour Assoc., has been correctly and honestly carried out.

We hereby turn over our organization to the United Furniture Workers of America, AFL CIO, with a clear understanding that all of the desires of both parties have been carried out, and from this day the employees of La-z Boy Canada Ltd., are members of the United Furniture Workers of America, AFL CIO."

It was also Mr. Riger's evidence that the employees of the intervener voted to adopt the applicant's constitution at the January 16th meeting and also adopted by-laws at that meeting.

8. Counsel for the intervener contended that notwithstanding the merger agreement which purported to make the employees of the intervener members of the applicant, the employees could not become members of the applicant since (in his submission) the applicant's constitution provides only for membership in a local, not in the International. However, a number of provisions in the constitution indicate that membership is not restricted to membership in a local of the applicant and that membership in the International itself is also possible; see, for example, Article II, Section 1(d) which refers to "members of the United



Furniture Workers of America”; Article V, Sections 1 and 4, which refers to “membership in good standing in the International”; Article XXIX, Section 2, which refers to “members of the International Union”; and Article XXXIV, Section 1, which refers to “members in the United Furniture Workers of America”. Moreover, it was the undisputed evidence of Mr. Riger that the applicant has an established practice of admitting persons to membership in the International during organizing drives and then assigning them to a local after the applicant has obtained the right to bargain on their behalf. Thus, by virtue of section 92(4) of the Act, in the circumstances of this case, the Board need not in any event have regard to the membership eligibility requirements of the applicant’s constitution.

9. Except as set forth above, the applicant has no officers, representatives, premises, members or collective agreements in Ontario (or elsewhere in Canada).

10. Counsel for the intervener contended that the applicant should not be found to have trade union status in Ontario because (in his submission) it does not have a “presence” in Ontario for collective bargaining purposes. In support of that argument, he referred to the applicant’s lack of officers, (resident) representatives, members, collective agreements, and premises in Ontario.

11. Section 1(1)(n) of the Act contains the following definition:

“‘trade union’ means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade union and a designated or certified employee bargaining agency.”

12. In determining whether an applicant is a trade union, the Board must address itself to the question: “Is the applicant a trade union as defined by the Act?” (see *CSAO National (Inc.)*, (1972) 2 O.R. 498 (C.A.)). Having regard to the statutory definition set forth above and the overall scheme of the Act, an entity seeking to establish that it has status as a trade union must, as a necessary first step, establish that it is an “organization of employees” (see *Armour Associates*, [1976] OLRB Rep. March 117). To be found to be an “organization” within the meaning of section 1(1)(n), the applicant must prove that it is a viable entity for purposes of collective bargaining, by establishing that it has a written constitution, by-laws, charter or other documentary evidence which prospective members could inspect in order to determine whether or not the organization is one which they would wish to join, and by establishing that it has officers who can carry out its objects (see, for example, *The Toronto Blizzard Soccer Club*, [1979] OLRB Rep. May 449; *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797; *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472; *Bauer Bros. Company*, [1977] OLRB Rep. March 159; and *Air Master of Canada Limited*, [1973] OLRB Rep. Oct. 540.)

13. In support of his argument that the applicant does not have a “presence” in Ontario for collective bargaining, counsel referred the Board to *A. H. Boulton*, 52 CLLC ¶17,035, in which the Board dismissed a certification application by a local union (of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) situated in Detroit, Michigan, because it was not satisfied that the applicant subsisted in any true sense within the province of Ontario. The brief reasons for decision in that case were as follows:

“Application for certification. The applicant, a local union situated at Detroit, has, for approximately two years past, been enrolling members in southwestern Ontario and has received a number of certificates from the Board. During the course of the present proceedings, however, it has come to the notice of the Board for the first time that none of the members of the executive of the applicant are either citizens of Canada or residents of Ontario and that the affairs of the local are entirely controlled from Detroit, the applicant merely maintaining an office at Windsor and employing several organizers in the province.

Clearly, proof of the status required to secure rights under the Act is a condition precedent to their conferment by the Board. By necessary implication, that status must be status within the jurisdiction. That being so, an organization to be entitled to the status of a trade union under the Act, must be a trade union existent in Ontario.

We are not satisfied that the applicant subsists in any true sense within the province and have therefore concluded that it is not entitled to the certification requested. The application is dismissed.”

Thus, the Board found in that case that the applicant, which was a local of an international trade union, did not have trade union status in Ontario despite the fact that it maintained an office in Ontario, employed several organizers in the province, and had received a number of certificates from the Board.

14. The Board commented upon the *Boulton* case, *supra*, as follows in *Metal Corporation of Canada Limited*, 55 CLLC ¶18.016, at page 1545:

“The trade union there was described by the Board in its decision as one in which ‘the affairs of the local are *entirely* controlled from Detroit’ (emphasis added). The Board added, and in our opinion this finding constitutes the very foundation stone of the decision, that it was not satisfied that the applicant ‘subsisted in any true sense within the province’. The principle there laid down must be confined to the special circumstances that came to the Board’s attention in that case...”

15. Counsel for the applicant candidly conceded that the Teamsters local in the *Boulton* case was in a stronger position in terms of “presence” in Ontario than the present applicant. However, he submitted that the *Boulton* case is bad law. He noted that the case has never been followed in the twenty-nine years since it was decided, and further submitted that it has been effectively overruled by the Ontario Court of Appeal in the *CSAO National* case, *supra*.

16. In *The Toronto Blizzard Soccer Club*, *supra*, the Board, in certifying The North American Soccer League Players Association, noted that the “applicant organization has established an office in Canada”. However, there is no indication in the decision that the parties made any submissions to the Board as to whether an applicant must take steps such as opening a permanent Ontario office in order to establish a “presence” in Ontario if it is to be found to be a “trade union” within the meaning of section 1(1)(n), nor is there anything in that decision which suggests that the applicant would have been found to lack status if it had not

established an office in Ontario, or had merely obtained permission to use the Ontario offices of another trade union as often as necessary for organizational and administrative purposes.

17. In the *CSAO National* case, *supra*, the Board found that an applicant for certification was not a trade union because a certain class of members (“provisional members”) were barred from holding office. In quashing the Board’s decision, the Ontario Court of Appeal found that the Board had exceeded its jurisdiction by creating “an unjustified impediment to the right of the union to certification subject to satisfying the express conditions to certification provided by the statute” (per Jessup, J. A.; McGillivray, J. A., concurring). In his judgment (with which McGillivray, J. A., concurred), Arnup, J. A., found that the Board had given itself an enlarged jurisdiction not warranted by the Act by “creating a condition or qualification not expressed by the statutory definition [of “trade union”], and adding it to that definition”.

18. It is firmly established that the Board can certify an international union which has its head office outside of Ontario (see *Ford Motor Co. of Canada Ltd.*, 46 CLLC ¶16.401, and *Metal Textile Corporation of Canada Limited*, *supra*). Indeed, section 1(1)(n) specifies that “‘trade union’...includes a provincial, national or international trade union...”. There is nothing in the Act which either expressly or implicitly requires an international trade union to have a permanent office in Ontario or to have officers or representatives based in Ontario. Section 77(1) of the Act merely requires every trade union in the prescribed form giving the name and address of a person resident in Ontario who is authorized by the trade union to accept on its behalf service of process and notices under the Act. Far from requiring a substantial “presence” in Ontario, that provision amounts to a legislative recognition of the fact that the representatives of an international trade union may well be based in another jurisdiction where it might be difficult to effect service of process and notices of the Act. Accordingly, in view of the *CSAO National* case, the provisions of section 1(1)(n) and the other provisions of the Act, the Board is not entitled to consider whether an entity which claims to have status as a trade union has established a “presence” in Ontario or “subsists in any true sense within the province”; the Board can only determine whether or not the applicant is a trade union as defined by the Act. Therefore, we agree with counsel for the applicant that the *Boulton* case cannot be considered to be authoritative with regard to the issue of trade union status.

19. Counsel for the intervener also questioned whether the applicant, according to its own powers as set forth in its constitution, has the power to operate in Canada. In support of his submission that operating in Canada is beyond the constitutional powers of the applicant, counsel noted that Section 1(b) of the objects clause (quoted above) refers to maintaining a “decent American standard of living”. He further noted that the applicant (pursuant to Article I, Section 2) is affiliated with the American Federation of Labour - Congress of Industrial Organizations, but not with the Canadian Labour Congress or the Ontario Federation of Labour; that since all of the “districts” and “regions” specified in the constitution are in the United States, there is no “district” or “region” (and consequently, no “district council”) for Ontario or for Waterloo; and that there is nothing in the constitution that gives the President of the applicant the power to authorize representatives of the applicant to organize or otherwise conduct the affairs of the applicant outside of the specified “districts” and “regions”.

20. Although the geographical scope of the applicant’s operations is not precisely set forth in the constitution, the document contains a number of indications that it is not limited



to the United States. Article I, in stating that “the organization shall be known as the United Furniture Workers of America”, also refers to it as “the *International Union*” (emphasis added). Similarly, the chief executive officer of the applicant is referred to as the “International President” (Articles XII and XVI). Article III describes the jurisdiction of the applicant as follows:

“The jurisdiction of the United Furniture Workers of America shall consist of all workers employed in or about the plants of manufacturers of furniture and kindred products; upholstered furniture; metal and plastic furniture; metal bedsteads, mattresses, bedding; bed springs and metal bed springs; all springs used by various branches of our industry; upholstered sleeping cars, day coaches, machine and hand tufted pads, hair, felt and jute products; cushions, canvas articles; curtains, draperies, bedspreads; lampshades; venetian blinds; burlap products; furniture slipcovers; sewars of all materials used in our industry; pianos, musical instruments, radio and phonograph cabinets; television cabinets; metal furniture; caskets, carriages and juvenile furniture; furniture novelties; shipping cases, rubberized pads used in our industry and veneer products; and all trades kindred to or allied to any of the above mentioned occupations.”

Thus, the jurisdiction clause contains no geographical limitations. Similarly, the selection (pursuant to Article IV, Section I) of the city in which the applicant’s convention is to be held is not limited to selection of a city in the U.S. We agree with counsel for the applicant that the establishment of districts and regions is merely a matter of administration. It is only natural that administrative districts and regions would not be created in an area (such as Ontario) until they are necessitated by responsibilities such as collective bargaining and collective agreement administration.

21. There is nothing in the constitution which precludes the International President of the applicant from assigning an official of the applicant (such as Mr. Riger) to conduct organizational activities in Ontario. The broad scope of the powers of the International President is evident in the language of Article XVI (Section 1) which empowers him to “supervise and direct all activities of the International Union and its officers” (except where it would conflict with the duties of the Secretary-Treasurer of the four Vice-Presidents). Subject to appeal to the General Executive Board (and, in some cases, to an International Convention), the decision of the International President concerning the interpretation of the constitution is “binding as a law” (Article XVI, Section 3).

22. Moreover, it is doubtful that the Board has any jurisdiction to inquire into the scope of the powers of the International President or to determine whether he was acting within his constitutional powers in authorizing Mr. Riger to engage in organizational activities in Ontario. In general, the Board has no jurisdiction to inquire into or regulate the internal affairs of a trade union except where it has expressly been given such powers by the legislature (as, for example, in provisions such as sections 60, 60a, 73, 75, 76 and 76a, none of which is applicable in the circumstances of the present case). Thus, in *Gold Crest Products Limited*, [1973] OLRB Rep. Aug. 436, the Board found the applicant to be a trade union despite the existence of “an arguable point” as to the “constitutional correctness” of the appointment of a

temporary committee by the membership to act pending election of a permanent committee. In so finding, the Board stated (at paragraph 4):

“The Board is primarily concerned with the constitution as a source of evidence of the existence of a viable organization and of evidence of the purpose and intent of the organization concerned so that the Board may be able to answer the question ‘Is the applicant a trade union as defined by the Act?’ (*Re C.S.A.O National (Inc.) and Oakville Trafalgar Memorial Hospital Association* (1972) 2 O.R. 498). Inquiries made as to the election of officers are made with a view only to aiding in the decision as to whether the organization is viable. In the present case, there is an arguable point as to whether the appointment of the temporary committee lies within the constitutional powers of what must be said to be a general meeting of the membership. It is quite clear, however, that the temporary committee is actively engaged in the activities of the organization carried on to date. The matter of the constitutionality of its appointment and actions is one of internal organization of concern to the membership, none of whom, insofar as the Board was advised, have challenged the propriety of the action.”

23. It is clear from the evidence taken as a whole that the applicant is a viable organization of employees formed for purposes that include the regulation of relations between employers and employees; it has a written constitution which has been duly adopted and which sets out the procedure for electing officers and calling meetings, and it has officers elected in accordance with the constitution who can carry out its objects. Accordingly, having regard to all of the evidence before it, the Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.

24. It is unnecessary for the Board to address itself to this decision to the contention by counsel for the intervener that the application should be dismissed because (in his submission) there is no provision for merger in the constitution of the applicant. That argument does not relate to the preliminary issue of the applicant’s trade union status, but rather relates to the issue of whether a merger, amalgamation or transfer of jurisdiction has occurred, which will be considered by the Board after it has heard evidence and argument on the merits at the continuation of hearing of this matter.

25. This matter is referred to the Registrar to be listed for continuation of hearing on April 30 and May 14, 1981, in accordance with the agreement of the parties.

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**2526-80-R The Blue Cross Employees' Association, Applicant, v. Ontario Hospital Association (Blue Cross), Respondent, v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Intervener.**

**Certification – Practice and Procedure – Pre-Hearing Vote – Pre-hearing displacement application by employee association following two unsuccessful termination applications – Whether third termination application in guise of certification – Whether Board imposing bar – Whether applicant required to prove status before pre-hearing vote ordered**

**BEFORE:** George W. Adams, Chairman and Board Members F. W. Murray and D. B. Archer.

***APPEARANCES:** Michael G. Horan and Debbie Cowan for the applicant; Douglas K. Gray and G. O. Ubels for the respondent; and L. A. MacLean, Q. C., P. Clancy and R. Nickerson for the intervener.*

**DECISION OF GEORGE W. ADAMS AND F. W. MURRAY; April 9, 1981**

1. This is an application for certification in which the applicant has requested a pre-hearing representation vote. The applicant seeks to displace the intervener for a unit of employees of the respondent described in the following terms:

All office and clerical employees of the Ontario Hospital Association within the Municipality of Metropolitan Toronto save and except section heads, managers or co-ordinators, persons above the rank of section head, manager and co-ordinator, secretaries to those above the rank of supervisor, audio visual staff, sales staff, communications staff, print shop staff, mail room clerks regularly assigned to reading mail, internal auditors, consultants, all employees in the Hospital Employee Relations Services Department (including personnel and payroll staff), all employees of the Investment Services Department, all employees of the Hospital Accident Prevention Department, systems analysts, programmers and all computer operations staff, maintenance engineers, pharmaceutical chemists, students employed during the school vacation periods and persons regularly employed for not more than twenty-four hours or less per week.

2. The intervener was certified as a bargaining agent for these employees on March 14, 1979. A lawful strike commenced September 21, 1979. An application to terminate the intervener's bargaining rights was filed February 21, 1980 but dismissed as premature. A second application was filed March 26, 1980 and dismissed by decision of the Board dated December 23, 1980. On the evidence before it, the Board could not be satisfied that at least 45 per cent of the members of the bargaining unit had voluntarily signified in writing that they no longer wished to be represented by the incumbent union. A request for reconsideration dated February 2, 1981 was also dismissed by decision dated March 13, 1981. The instant application for certification is dated February 18, 1981 and filed by an association that has not been found to be a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act* in any previous proceeding. By decision dated March 13, 1981 another panel of the Board



reviewed the submissions of the intervener (and the responses of the applicant and respondent) that the application was untimely having regard to section 92(2)(i) and that, in any event, the applicant was not entitled to a pre-hearing vote because it had not established its status as a trade union in any previous proceeding before the Board. The panel directed a hearing in order to entertain evidence and representations with respect to:

- (i) the relevance of section 92(2)(i) to the instant application; and
- (ii) the entitlement of the newly formed applicant association to a pre-hearing vote.

3. The evidence reveals that the intervener gave notice to bargain to the respondent in March 1979. The first available date for a meeting was April 27, 1979. On May 3, 1979 after the one April meeting the intervener applied for the appointment of a conciliation officer and did so before obtaining the employer's response to its proposal. The next meeting was June 8, 1979 with the conciliation officer and the intervener immediately requested the issuance of a "no-board" report. Following the issuance of this report and prior to the commencement of the strike on September 21, 1979, some fifteen to eighteen negotiation meetings were held. Mr. Joseph Maloney, chief negotiator for the intervener, testified that the two major areas of dispute between the parties consisted of the monetary items and the appropriate union security clause. He said that bargaining first centred on non-monetary items and the union security issue was placed with the monetary issue. The Board was advised that at the time of the strike some language issues, all monetary items and the union security clause issue were outstanding. On the latter issue, the trade union moved prior to the strike from its initial proposal of compulsory union membership for all employees to compulsory payment of union dues by all employees. The employer moved from its initial position of voluntary revocable check-off to a modified Rand Formula. There were at least two meetings between high level officials of the intervener and the respondent immediately prior to the strike but they were to no avail. No meetings between the parties occurred after the commencement of the strike and prior to the first application for termination of bargaining rights on February 22, 1980. Maloney testified that at the time of the strike there were some four hundred employees in the bargaining unit and that about half of these employees went on strike. By February 1980 seventy to one hundred employees remained on strike and at the time of this hearing sixty-one employees were said to be actively engaged in strike and picketing activity. The first application for termination of bargaining rights was filed February 21, 1980 and dismissed March 25, 1980. On that same day (i.e. March 25), the intervener requested the Minister of Labour to reconvene negotiations. By letter dated April 15, 1980 the Minister noted that a second termination had been filed and the employer's preference to await the completion of those proceedings.

4. On June 12, 1980 Bill 89 was passed into law. One of its provisions made mandatory the payment of union dues by all bargaining unit employees, effectively taking this issue off the bargaining table between the parties. However, at the time of passage of the legislation the parties were involved in the second application for the termination filed March 26, 1980. The proceedings were lengthy and paragraph 6 of the Board's decision of December 23, 1980 dismissing the application notes that the intervener's insistence on placing before the Board "the full history of the bitter relationship that had evolved" between the intervener and respondent was a major factor contributing to the length of the case. Unfortunately, the evidence was found to be of no value and the panel, in hindsight, observed that the more

narrow approach of *Ottawa Journal*, [1978] OLRB Rep. Mar. 291 may have been preferable. No bargaining was undertaken between the parties while that case was in progress. On the very date the termination application was dismissed the intervener sent a telegram to the Ministry of Labour requesting mediation. Apparently, the earliest dates that could be arranged for the meetings were January 21 and 22, 1981.

5. Before reviewing the bargaining opportunity between the intervener and respondent between the date of dismissal of the second termination application and this application for certification, the Board would be remiss if it did not comment on the nature of the economic confrontation between these parties that has existed up until this point in time. Exhibit 23 reveals that the Ontario Hospital Association, founded in 1924, is the voluntary organization of public hospitals in the Province and also has in its membership many other health-related agencies and institutions. The O.H.A. provides hospitals with a wide range of representational, educational and administrative services. In addition, through its Blue Cross Division, the O.H.A. has since the early 1940's provided prepaid health benefits to millions of individual and group subscribers in Ontario. Exhibit 23, introduced by the intervener, reveals that Blue Cross is a non-profit organization. Any surplus which may accrue is used for the benefit of its subscribers. The O.H.A., including Blue Cross, is governed by an elected 45 member Board of Directors, who serve without remuneration. The members of the Board consist of hospital trustees and chief executive officers from the O.H.A.'s twelve regions throughout the Province. There can be little doubt that the respondent saw the strike called by the intervener as directly related to the intervener's demand that all bargaining unit employees be required to pay union dues. Evidence adduced by the intervener before this panel pictured the O.H.A. representatives as confrontationist in the final few meetings before the strike, but at that very same time it would appear that the intervener was threatening the respondent with a massive loss in business if its demand on union security was not met. Confrontation sparks confrontation and the Board places no weight on the intervener's evidence in this respect. It is highly unlikely that the reasons why this dispute occurred and subsequently lasted so long are amenable to simple analysis. Moreover, with the passage of time events have engendered new controversy and conflict. Apparently, true to its work, the intervener engineered a major boycott by other collective bargaining relationships of Blue Cross health plan carrier services. For example, Exhibit 23 reveals that General Motors, Ford and Chrysler, at the insistence of the intervener, dropped Blue Cross as their health plans carrier even though all of these companies were very satisfied with Blue Cross services over many years. The exhibit reveals that the intervener enlisted the assistance of the central labour bodies in its effort to inflict business losses on the respondent and that members of the Legislature were lobbied for a change in Ontario labour laws. This boycott has had an adverse impact on the size of the bargaining unit. In turn, the respondent mounted its own campaign aimed at politicians of which Exhibit 23 was a part. Moreover, its resistance to the intervener's bargaining demands has inflicted considerable losses on that trade union and its supporters. Exhibit 18 indicates that the intervener "has paid out well over \$500,000" to further its interests in the dispute as of March 11, 1981. It would also appear that only about one-half of the bargaining unit members initially supported the strike and their numbers had declined to sixty-one employees some eighteen to nineteen months later. The bargaining unit prior to the strike consisted of slightly over four hundred employees and at the time of the instant application had fallen to three hundred and eighty-two not including the sixty-one employees said to be still on strike. The earlier panel hearing the termination application characterized the dispute as "bitter" and existing within an atmosphere "charged in the extreme." This panel does not quarrel with that assessment. No one could.

6. We pointed out that following the intervener's telex of December 23, 1980, the Ministry of Labour's Conciliation and Mediation Services arranged meetings between the intervener and respondent for January 21 and 22, 1981. At the January 21st meeting the union submitted two documents. Document A consisted of some 28 pages of language previously agreed to by the parties (with a few exceptions). Document B was styled "Union Proposal To Settle All Outstanding Issues." This document dealt with some 18 items still thought to be outstanding between the parties. The first two pages of this latter document summarize these items in the following manner:

- |   |   |
|---|---|
| 1. Union security language  | — Attachment #1   |
| 2. One additional paid holiday  | — as per company offer Aug. 30/79*  |
| 3. Vacations with pay   | — as per company offer Aug. 30/79*  |
| 4. Benefit plans  | — as per company offer Aug. 30/79*  |
| 5. Pensions   | — current programme right of employee to pick up time lost by strike at own expense |
| 6. Job Descriptions   | — as per letter dated Aug. 16/79 and attachments. Attachment #3                     |
| 7. Classification Grades  | — as per company offer Aug. 30/79*  |
| 8. Salaries   | — as per attachment #4  |
| 9. Overtime   | — as per attachment #5  |
| 10. Termination of agreement  | — November 1, 1981  |
| 11. Shift premiums  | — as per company offer Aug. 30/79*  |
| 12. Leave of absence (Operating of Motor Vehicle)   | — as per letter June 15/79. Attachment #6   |
| 13. Paid Education Leave<br>Filing Cabinet<br>Copies of agreement   | — withdraw  |
| 14. Return all employees on strike at time of ratification to previous job and classification and no loss of seniority. |   |
| 15. Removal of discipline re E. Richardson and E. Cust  | — Attachment #7<br>— Attachment #8  |
| 16. Settlement pay to all employees on roll as of September 14, 1979 and still on roll at date of ratification          | — \$300.00  |



17. Wages to be effective as of date of ratification

18. Commencement of benefits for all workers off work because of participation in strike to be effective first of month following date of ratification

\*Company offer of August 30/79  
Attachment #2

The respondent's reply dated January 21, 1981 took the following form:

In response to the union's proposal, the employer replies as follows:

1. Items 2, 3, 4, 6, 7, 10, 11 and 12 now appear to be agreed upon. Subject to satisfactory contract language to be settled, our understanding of the agreement on these matters is as follows:
  - a) Item 2 - Additional paid holiday will mean total of 11. Additional holiday is anniversary date of employment with OHA, to be taken within a period of 30 days after such date, on a day to be approved in advance by the employee's supervisor.
  - b) Item 3 - Vacation entitlement will be:
 

2 after 1
3 after 4
4 after 13
5 after 22
  - c) Item 4 - All current plans to remain in effect.
  - d) Item 6 - As per letter of August 16, 1979, and descriptions already attached for job grades 2, 3, 5, 6 and 7. Description for job grade 4 missing (already supplied to union) and will be supplied by employer. This will exist as a letter of understanding, not part of the collective agreement.
  - e) Item 7 - Classification grades are grades 2, 3, 4, 5, 6 and 7.
  - f) Item 10 - Termination of agreement November 1, 1981.
  - g) Item 11 - Shift premiums subject to mutual agreement should shifts be implemented.
  - h) Item 12 - As per letter of June 15, 1979. This will exist as a letter of understanding, not part of the collective agreement.

If our understanding is correct on these items, we will prepare contract language for signing off.

2. Attached hereto is union proposal dated August 9, 1979. Clarification required as to whether items in that proposal are withdrawn or whether there are still items therein that the union wished to pursue.

3. The employer will consider remaining matters listed in union proposal, and will respond to as many items as possible, tomorrow, January 22nd. In the meantime, certain other matters require consideration:

- a) We would like to reach agreement on the identity of the persons still on strike who have not severed their employment with Blue Cross. Would the union please prepare a list of who they believe to be such persons.
- b) Ratification procedure.
- c) Status of persons who employer believes attempted to defraud Blue Cross by submitting claims for benefits after coverage cancelled. Also, status of employee convicted of improper behaviour on picket line, upheld on approval.
- d) Union boycott and pressure on other employers to change carriers is continuing, resulting in further losses of business and jobs. What does the union intend to do about this?

The employer requests consent of the union to implement, on an interim basis, pending resolution of all other outstanding matters in dispute, an interim wage adjustment of 9% across-the-board, retroactive to January 1, 1981, for members of the bargaining unit, as it intends to do for non-bargaining unit employees. This would, of course, be without prejudice to the right of the union to bargain for larger increases.

The negotiations on January 21, 1981 lasted from 10:00 a.m. until 6:30 or 7:00 p.m. and the only face to face meeting was between Mr. Patrick Clancy appointed to conduct negotiations for the intervener from January 1981 onward and Mr. George Hubels, the respondent's Associate Director of Human Resources.

7. Representatives of the intervener and respondent met again on January 22, 1981. Clancy testified that he thought the parties had a good discussion on the 21st. In his view the next day was even more fruitful. It was spent clarifying many issues, for example the effect of the boycott, and a number of items in Document B were at least tentatively agreed to (i.e., items 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13 and 18). The intervener's response to the concerns of the respondent raised the preceding day was:

- a) list of outstanding employees exchanged. 5 names to be checked.
- b) Ratification Procedure - will discuss, should be no problem.

- c) all employees to be returned to work with no discipline on records.
- d) will stop completely when agreement ratified and ratified includes return to work of all striking employees.
- e) 9% Jan. 1-81 union disagrees with payment at this time hold until Feb. 3-81.
- f) all items agreed to as of Jan. 22-81 to be put in writing and signed off.

8. Clancy testified that at the end of January 22, 1981 the two parties had an understanding of their respective positions. However, he said that one of the "stickiest" issues is the timing of the return to work of striking employees in that both Hubels and Clancy have taken the position that they are "not going to sacrifice any soldiers". But he also testified that Mr. Hubels said he did not have authority to deal with some of the issues such as recall and would have to seek direction from a committee within the respondent organization. A meeting of that committee was to take place the following weekend and the issues were to be discussed at the time. The parties therefore agreed to meet again on February 3, 1981. The January 22, 1981 meeting lasted from 10:00 a.m. to 4:30 p.m.

9. The meeting on February 3, 1981 involved the same representatives with the addition of Robert Nickerson for the intervener, Assistant to the Canadian Director. The respondent had prepared contract language embodying the earlier agreements in principle and presented an eight page document for the intervener's consideration dealing with Articles 19 (hours of work and overtime), 23 (salaries), and 27 (benefits). From the Board's point of view, two relatively minor problems were encountered with language on Articles 25.04 (absence of an employee on a holiday) and 26.06 (vacation scheduling) but the heated reaction of both parties appears to have prompted the mediator to adjourn the meeting. In essence, the meeting broke up because the intervener wanted first to see the respondent's complete position before agreeing to the language items. It should also be noted that at this or the previous meeting Mr. Hubels showed Mr. Clancy a letter from Mr. Horan written to the respondent requesting a supervised ratification vote of any contract settlement. Clancy told Hubels that the intervener "would not be raising the ratification issue" and that he saw no problem "with what they discussed the last day" (presumably a reference to item b) in paragraph 7 above).

10. Thereafter some confusion appears to have arisen over who was to arrange the next meeting. But, in any event, the respondent appears to have proposed that Clancy and Hubels meet on February 14, 1981 and that a formal meeting of representatives be held on February 19, 1981. However, Mr. Clancy's daughter was being married on February 14, 1981 and he also had some difficulty in understanding the need to meet Mr. Hubels alone. The parties therefore did not agree to meet before February 19, 1981. Clancy testified that he attended at the hotel on that date only to be advised by the mediator that the respondent's solicitor was now in receipt of a letter indicating the instant application for certification had been made to the Board and that the negotiations could not continue with such a matter outstanding.

11. None of the parties before the Board objected to the Board comparing employee involvement in the two sequential applications as one considered in the application of section 92(2)(i). This comparison reveals that 60% of the employees supporting the applicant were



also petitioners in the earlier termination proceeding and the President, Vice-President and Secretary of the applicant are mentioned in the decision of the Board in that earlier matter as very active petitioners. Also to be noted is the fact that Mr. Horan who acts for the applicant in this matter also acted for the petitioners in their request for reconsideration filed on January 22, 1981 and, apparently, also corresponded with the respondent on their behalf with respect to the ratification vote issue.

12. Finally, we observe that the presence of the applicant has spawned the issuance of a number of information leaflets by both the intervener and applicant. The purport of the intervener's leaflets is to question the capacity of a local employee association to bargain a collective agreement where the intervener has been trying to do the same since September 1979. The intervener has also questioned the origin of the applicant questioning whether it is "a real union." In response, the applicant has accused the intervener of being "afraid" of a representation vote and having to pay for "fat union salaries." Of particular note in the applicant's literature are the following excerpts:

Exhibit 19b

As everyone now knows, the Labour Board has decided that the employees at Blue Cross are not entitled to a vote to decide if they still want the UAW to represent them. Although there is no doubt that the majority of our employees would vote against them, it seems that we are stuck with the UAW until we do something in a positive way to get rid of them.

At the present time the UAW are still the bargaining agent of the Blue Cross employees. They have spent two years in unsuccessful attempts to get a contract for the employees. During that time there has been nothing but turmoil, bitterness and loss of jobs. The UAW have not succeeded in doing what they have promised to do.

A number of the employees at Blue Cross have now decided that we could do a much better job on our own. We have decided to form our *own association*. We intend to go before the Labour Board to get official recognition as the bargaining agent for the Blue Cross employees. We have already passed a Constitution and we intend to approach the employees to join our Association and thereafter we intend to bargain with the Company to get a contract for the employees.

Exhibit 19d

"Failure to join our Association is equivalent to supporting the UAW because the Labour Board will not recognize a "non-position". You have only two choices: your Association or UAW."

"If you fail to join our Association now there is a chance that the UAW could ratify a contract with Blue Cross that could make them your representative for a long time. Once a contract is ratified, there is no way out."

## Exhibit 19a

“We know we can bargain a contract with the Company because we are not all hung up on getting strikers reinstated as part of any settlement. Remember that if 61 strikers come back to Blue Cross they are going to want to take 61 jobs. We are concerned about your job security.”

13. On the application of section 92(2)(i) of the Act, it was submitted on behalf of the intervener that bargaining has been overshadowed by representation proceedings since February 21, 1980; that, as a result, negotiations between the intervener and respondent had been severely impeded; and that since the dismissal of the second application for termination on December 23, 1980 this had continued to be the case. Counsel submitted that the evidence clearly revealed an inadequate opportunity for the intervener to negotiate a collective agreement between December 23, 1980 and the launching of the instant application for certification on February 18, 1981. It was submitted that new issues had arisen because of the strike and the passage of time and that progress was being made by the parties until negotiations were brought to a halt by the application at hand. Counsel contended that at no time had the intervener failed to pursue its bargaining mandate but the bargaining was charged with conflict and had not been a “picnic”. Counsel submitted that the facts before the Board represented the classic situation for which section 92(2)(i) was designed. Emphasis was placed on the similarity between those persons who were involved as petitioners and counsel in the earlier termination proceedings. Counsel for the intervener pointed out that counsel for the applicant had acted for the petitioners in writing to the respondent in early January about bargaining and in filing an application for reconsideration with the Board on January 22, 1981. He also observed that most of the key officials of the applicant were active petitioners whose names are revealed in the Board’s earlier decisions dismissing the termination application. It was stressed that the intervener needed more time to rehabilitate itself as bargaining agent after the effects of the earlier proceedings. In making this argument, counsel drew the Board’s attention to *Trinidad Leaseholds*, 52 CLLC ¶ 17,005; *Filey-Hall Paper Box*, 52 CLLC ¶ 17,037; *Windsor Lumber Co. Ltd.*, 58 CLLC ¶ 18,104; *Wesmak Lumber*, [1961] OLRB Rep. Mar. 447, *Continental Can*, [1964] OLRB Rep. Dec. 459; *Seven-Up*, [1971] OLRB Rep. Dec. 791; and *Dunnville Supermarket*, [1980] OLRB Rep. Aug. 1193. Finally, on this portion of his argument, counsel asked the Board not only to dismiss the instant application on the basis of section 92(2)(i) but also to impose a ten month bar to any additional applications. It was submitted that the Board should not encourage either the respondent or the applicant that another application for certification will be entertained in a short while. Counsel contended that meaningful collective bargaining required certainty in this respect and a ten month bar would provide such a result. With respect to the applicant’s entitlement to a pre-hearing vote, counsel for the intervener contended that the Board lacked jurisdiction to direct a pre-hearing vote where an applicant’s status as a trade union had not been first determined in earlier proceedings before the Board. Alternatively, it was contended that because of all the earlier disruption the intervener ought not to have to submit to a representation election until the applicant had first established its status as a bona fide trade union. The intervener therefore asked the Board to exercise its discretion and deny the request for a pre-hearing vote as in *Brown Shoe Co.*, [1965] OLRB Rep. Dec. 584.

14. Counsel for the respondent submitted that the Board’s policy of directing a pre-hearing representation vote but sealing the ballot box until after a new organization as applicant had established its status was the fairest approach and clearly within the Board’s jurisdiction. Relying on *CSAO National (Inc.) v. Oakville Trafalgar* (1972), 26 D.L.R. (3d) 63,

it was submitted that a Board finding of status merely recognizes what already exists. Counsel submitted that there existed no special circumstances to take the case of the approach laid down in *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316. With respect to the application of section 92(2)(i), counsel for the respondent submitted that, on the clear wording of that section, the Board could not impose a specific bar of any kind where the applicant was not an earlier unsuccessful applicant. It was therefore submitted that the most the Board could do in the instant matter was refuse to entertain the application. And on this later issue it was agreed that “a reasonable opportunity to bargain” was only one factor to be considered. Other matters related to the similarity of applicants and the precise nature of the representation issues raised before the Board by sequential applications. Counsel argued that the instant application raised an entirely different representation issue, i.e. a choice between trade unions. The applicant is a new legal entity and people other than former active petitioners were involved in its activities. Counsel contrasted this situation with *Filey-Hall Paper Box* where the Board observed a one hundred per cent overlap between those supporting an earlier certification application and those supporting the challenged termination proceedings. Counsel also suggested that there was a qualitative difference to be considered where a certification application followed a termination application, as in the instant case, in that a subsequent certification application would clearly run afoul of section 92(2)(i) whereas certification applications often follow on the heels of successful termination application. On the issue of “reasonable opportunity to bargain”, counsel urged the Board to have regard to entire circumstances from the beginning of bargaining. Counsel suggested that the intervener was the author of its own misfortune. It had pushed through conciliation before even getting the respondent’s reply to its opening proposal. It had struck in a first agreement situation with only half the support of the bargaining unit and with fifteen to twenty issues outstanding. And that the only real attempt to get a meeting with the respondent was on the filing of the first application for termination. It was pointed out that since December 23, 1980 there had been two full days of bargaining and that the intervener had “frittered away” the third and fourth days available.

15. On behalf of the applicant, it was submitted that the instant application was different from the earlier termination application and raised quite a different question for affected employees. Counsel argued that the two matters would reflect a substantial overlay of supporters because a number of employees continue to be unhappy with the quality of existing representation. It was contended that because of the substantial passage of time and the effects of the strike, a great number of employees in the bargaining unit have not had their wishes tested with respect to continued representation by the intervener and the scheme of the legislation was clearly designed to provide such an opportunity should the Board be in any doubt. Counsel urged the Board to consider the intervener’s entire bargaining relationship with the respondent in determining whether it has had a reasonable opportunity to bargain. It was submitted that eighteen months or more was clearly sufficient time to negotiate a collective agreement and that between December 23, 1980 and February 18, 1981 the intervener knew of the ongoing interest of dissatisfied employees and should have been more diligent. Finally, on this issue, counsel contended that the delay in processing the second termination application was due to the intervener’s conduct and that there was little if any “stability and continuity” in collective bargaining between the intervener and respondent to be considered under section 92(2)(i) in any event. On the issue of the pre-hearing vote, counsel stressed the importance of a quick vote and the prejudice to his client if deprived of an opportunity to proceed under section 8.

16. Save for section 92(2)(i) of *The Labour Relations Act* this is an otherwise timely



application for certification. The intervener was certified March 14, 1979 to represent the employees in the affected unit and a lawful strike commenced September 21, 1979. Section 53(1) gives a newly certified bargaining agent approximately one year free of representation controversy to negotiate a first collective agreement and this provision is made expressly subject to section 53(3) which stipulates, when a strike has been commenced, a six month bar against representation proceedings calculated from the commencement of the strike. Thus, by the end of March 1980 the intervener's bargaining rights were at risk. This legislative scheme reflects a balancing between employee wishes and the requirement of stability for meaningful labour negotiations. A trade union that has achieved the degree of employee support to entitle it to certification, is also entitled to a reasonable and meaningful period of time in which to attempt to fulfil its bargaining mandate. If after the issuance of a certificate the certified trade union had immediately to defend itself against an unlimited number of challenges to its status as bargaining agent, the impairment to its stability to negotiate a collective agreement would be obvious. So too would be the consequences for industrial peace and stability. Accordingly, while employee wishes are of fundamental importance under *The Labour Relations Act*, the practice and procedure of collective bargaining demands that representation issues should not be raised indiscriminately.

17. A balancing of these same interests is carried through by section 92(2)(1) to that period of time where representation proceedings are timely under section 53 but where there has been already one unsuccessful application during the so-called "open period." However, the balancing of such interests is left to the Board. No automatic bar or mandatory refusal is provided for. Section 92(2)(i) provides:

Without limiting the generality of subsection 1, the Board has power,

(i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within a period not exceeding ten months from the date of the dismissal of the unsuccessful application.

18. The Board's understanding of the rationale for the section was set out in the *Trinidad Leaseholds (Canada) Ltd.* case, 52 CLLC ¶17,005 where a collective agreement had expired on July 6, 1948 and an application for certification, filed May 28, 1949, had been dismissed on July 27, 1949. In refusing to entertain a second application for certification filed on July 28, 1949 by the same applicant the Board wrote:

...In respect of regulation 7(4), with which we are immediately concerned, it would not in our view, accord with the manifest purpose of that regulation to conclude that once the ten month period has passed any number of applications may then be made, without interval, by the same applicant. On the contrary, we are of the opinion that where there is a current and active collective bargaining relationship and where an application, properly made under regulation 7(4), is rejected on the ground that the applicant does not enjoy the requisite employee support,

a second application by the same applicant should not be entertained by the Board until a reasonable opportunity has been given to the parties to the collective agreement to bargain collectively with a view to its renewal.

The question of representation which we are now asked to determine was tried by the Board as recently as July 27, 1949, at which time the Board found that the applicant did not have as members in good standing a majority of the employees concerned. The right of the employees affected to select a new bargaining agent has thus been fully recognized although, in actual fact, no new bargaining agent was designated. We must now take into account what is, as indicated by regulation 7(4), the equally important consideration of stability and continuity in collective bargaining. Our earlier decision, by implication, identified the intervener as the authorized bargaining agent of the employees affected. Little purpose was served if the right of intervener to continue to represent those employees was immediately thereafter again subject to question at the instance of the same applicant. The respondent and the intervener have inevitably been hampered in their collective bargaining activities during the period when they would ordinarily have been directing every reasonable effort toward the negotiation of a renewal of the collective agreement. It is our view that before the Board undertakes a further consideration of the question of representation on an application by the present applicant the respondent and the intervener must be permitted a reasonable period of time during which to carry on collective bargaining without hindrance.

Accordingly, we find that the application is not timely and it is therefore dismissed.

19. From the facts before the Board in that case and its articulation of policy, it is apparent that the Board directed its attention only to the period of time between the unsuccessful application and the second proceedings in determining whether there had been a reasonable opportunity to bargain. The encumbant trade union appears to have had almost a full year to negotiate a collective agreement before the bringing of the first application for certification and yet there was no attempt to assess the quality of bargaining during that period. See also *Continental Can Company of Canada Limited*, [1964] OLRB Rep. Dec. 459 where only this period was emphasized. However, it occurs to this panel that there must surely be cases where the importance of the opportunity for bargaining between the two most recent applications would be less significant. For example, where there has been a long and unsuccessful strike and the passage of time has simply deepened the impasse between the parties, "the opportunity for [further] bargaining" approach may not be so obviously applicable. Indeed, in certain "lost strike" situations it may be difficult to develop a rationale preventing any number of decertification or certification applications, in that a bargaining relationship which deteriorates to such an unresolvable impasse is unlikely the kind of situation section 92(2)(i) was designed to shelter nor would it appear to be the kind of situation employees need endure without the benefit of review by access to a representation vote. Whether the instant matter falls within this category of case is something that will be considered below. Suffice it now to say we do not agree with the intervener's submission that the Board should focus exclusively on activity between the two applications, i.e. between

December 23, 1980 and February 18, 1981. Moreover, we observe that there is no reported case which has considered the application of section 92(2)(i) after the expiration of some twelve months of “protected” bargaining which included approximately six months of strike activity.

20. The Board has also said that the *Trinidad Leaseholds* phrase of “a current and active bargaining relationship” refers to the activity of the union in bargaining during the relevant period and not to the degree of support which the union may enjoy among the employees in the bargaining unit. Thus, the Board has not been prepared to speculate as to a trade union’s ability to enter into or to carry through negotiations successfully in determining whether a reasonable opportunity was afforded to the incumbent bargaining agent after the dismissal of the first application. See *Canadian Sealright Co. Ltd.* 59 CLLC ¶18,157 and *Continental Can Company of Canada Limited*, *supra*. But again, we observe that this principle was not developed in the context of the kind of unresolvable impasse or passage of time hypothesized in the previous paragraph. Accordingly, this principle too must have some limitations.

21. Passing to a third consideration revealed by the earlier cases, the intervener is correct in asserting that neither the Board nor section 92(2)(i) draws a sharp distinction between the kind of representation proceedings involved in any two applications or requires a precise identity between the respective proponents or each. However, counsel for the respondent is correct in submitting that when the applications are of a different kind, the identity of the respective proponents is not an irrelevant factor. For example, in *Filey-Hall Paper Box Co. Limited*, *supra*, the initial application was one for certification and the second was that for a declaration terminating bargaining rights. The Board concluded that the principle explained in *Trinidad Leaseholds* applied particularly where substantially the same group of employees supported both applications and where the person authorized to represent the employees before the Board was the same person authorized to represent them in the earlier proceeding. The Board concluded that in all the circumstances the second application was brought “to try the same representation dispute” that was previously before the Board and dismissed. On the other hand, in *Canadian Sealright Co. Ltd.*, *supra*, the two applications were both bargaining right termination proceedings and the second application was supported by two original petitioners and two new supporters. A reading of the case reveals that the absence of a precise identity between the employees supporting the first and second applications did not discourage the Board from refusing to entertain the subsequent application. And contrast these cases with those dealing with the imposition of a six month bar following a representation vote but where there is no incumbent union. See *The Clorax Company of Canada Ltd.*, [1980] OLRB Rep. Feb. 184. Counsel for the respondent submitted that an important difference existed where the second application was one of certification because such an application could not be followed by a second application free from an explicit statutory bar. Whereas, on the other hand, he pointed out that successful termination applications are often followed by an application for certification. Implicit was his suggestion that the instant application is somehow less disruptive and thus deserving of greater consideration. While this submission does accurately reflect a potential difference in the two types of applications, we do not think the distinction is one that can be acted on while, at the same time, accepting the policy underlying section 92(2)(i). Whether the second application is one of certification or termination, the disruption to collective bargaining after the dismissal of the first application can be identical. Moreover, the explicit statutory bars to subsequent applications would only be triggered if the raiding applicant for certification on the second



application won the representation vote. Indeed, one could argue that the Board should be less concerned about a second termination application in that if it is successful there remains no bargaining relationship that can be disrupted by yet another application.

22. Finally, the cases reveal that where special circumstances cause the dismissal of an initial application the Board may be willing to entertain an immediate second application. These cases can also be seen as an attempt by the Board to balance employees wishes against stability in collective bargaining. Where an initial application is dismissed because of “a technical irregularity”, it has been the Board’s view that a second application ought to be entertained to determine effectively the real representation issue before it. Initial cases so dismissed are usually dispatched quickly and cause little adverse impact on any ongoing bargaining by the incumbent. However, just what constitutes a technical irregularity is not easily defined. The filing of “stale-dated” cards by mistake even when “fresh” cards pre-existed the first application has been held not to raise a special circumstance avoiding the application of section 92(2)(i). See *Windsor Lumber Co. Ltd.*, *supra*. On the other hand, the dismissal of a first application because of the impact of section 92(2)(a) on the membership support of an applicant forced to accept the application date of a competing but earlier application has been held not to prevent a second application. It was thought that any other result would be “unfair and unduly technical”. See *Du Pont of Canada Limited*, [1967] OLRB Rep. Nov. 737. The Board has also allowed a second termination application where a first application was dismissed because an applicant did not know enough to call available evidence regarding the circulation of a petition or because a principal witness was on vacation out of the country and the necessity of his attendance was not appreciated. See also *Soo Dairies Limited*, [1971] OLRB Rep. July 439 and *Calvin W. Golbeck*, [1978] OLRB Rep. June 543. However, the cases also make it clear that where there is an ongoing bargaining relationship an application need not result in an actual representation vote to cause the Board to refuse to entertain a second application under section 92(2)(i). For example, an application for certification dismissed because the applicant could not establish itself as a trade union within the meaning of the Act has provided a basis to the invocation of section 92(2)(i). See *Filey-Hall Paper Box Co. Ltd.*, *supra*. A similar result has followed where a certification application was dismissed at a hearing because of clearly insufficient membership evidence support. See *Trinidad Leaseholds (Canada) Ltd.*, *supra*. The same end can befall a second termination application where the first is dismissed because the Board is not satisfied that at least 45% of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the incumbent trade union. See *Seven-Up (Ontario) Limited*, [1971] OLRB Rep. Dec. 791; *Continental Can Company of Canada Limited*, [1964] OLRB Rep. Dec. 459 (the second application dismissed June 25, 1964).

23. The exercise of a discretion where the competing interests are as fundamental as in the instant case always presents a difficult decision. However, the Board must do its best to articulate the considerations to be considered and its reasons for assigning them particular weights.

24. In favour of refusing the application is the apparently uncompleted discussions between the intervener and the respondent since the dismissal of the termination application. While the earlier major difference between them has been removed by legislation, a new and difficult issue has surfaced as a result of the passage of nineteen months following the commencement of the strike. Also outstanding are many monetary items and certain differences over language. Indeed, the applicant’s published position on the status of striking

employees revealed in the excerpt from Exhibit 19a adds force to the intervener's argument that it should be allowed to pursue bargaining on their behalf. Speculation over the fruitfulness of future discussions between the respondent and the intervener on this issue could be seen as violating the Board's earlier reasoning in *Canadian Sealright* discussed above.

25. A second factor in favour of a refusal, is the close association between the earlier termination application and the instant certification application. A substantial majority of the employees supporting the applicant were petitioners. Key officials of the applicant were prominent petitioners. The solicitor for the applicant acted for the petitioners in writing to the respondent in early to mid-January on the topic of contract ratification procedures. He acted for them on their application for reconsideration. And this application was filed before the reconsideration request had even been dealt with by the Board. The close association between applications is also revealed in the literature of the applicant, excerpts of which are reproduced above. The totality of this issue raises the concern expressed by the Board in *Filey-Hall Paper Box Co. Limited*, *supra*, that this second application has been brought "to try the same representation dispute" that was previously before the Board and dismissed.

26. In support of entertaining the application is the overall duration of the conflict between the respondent and the intervener. The intervener was certified March 14, 1979 and had twelve months of "sheltered" negotiating time including six months of strike action to achieve a contract. After the passage of that time the intervener had not achieved a contract and it requested the resumption of meetings between the parties only after the filing of the first termination application. As of that same point in time, only twenty per cent of the bargaining unit remained on strike. Had the second termination application been processed and dismissed by this Board within a month of its filing, i.e. before June 1980 and Bill 89, the Board would have been hard pressed to characterize the situation as anything other than one involving irreconcilable difference. Once such a clear and unequivocal impasse involving strike action has arisen and continues beyond the period provided in section 64, it may be more difficult to talk realistically about the right of the incumbent union to a further opportunity to bargain. It can be persuasively argued that at such a juncture stability in labour negotiations should give way to the wishes of the very employees who have been embroiled in the conflict for such an extended period. Of course, each case should turn on its own particular facts. We would also note that the legislative schemes in other jurisdictions dealing with the relationship of ongoing negotiations to representation proceedings are quite different. See *Adams Laboratories Ltd.*, [1980] 2 Can. LRBR 101; *CJMS Radio Montreal (Quebec) Limitée*, [1979] 1 Can. LRBR 426. The legislation of this Province has again taken a distinctly different approach and this Board must honour the implications that arise from it in cases of this kind.

27. Also in favour of entertaining the application is the fact that the second termination application did not result in a representation vote and the Board expressly found that the respondent had not engaged in any culpable conduct. The Board simply could not be satisfied that everyone who had signed the petition did so voluntarily because of the way in which it was circulated. In this sense, the wishes of all bargaining unit employees have not been directly tested. With the great passage of time both in the processing of the case and since the issuance of a certificate to the intervener (i.e. two years) it is not particularly suprising that objecting employees wish to continue to place the intervener's status as bargaining agent in issue. Moreover, the intervener's position on the return of the remaining striking employees and its ongoing boycott activity would obviously concern replacement and low seniority employees given the reduced bargaining unit size. And finally, this application presents a choice between bargaining agents. The issue in the earlier proceeding was quite different.

28. Two section 92(2)(i) issues are before us. Should we entertain the instant applicant? And, if not, can we and should we go on to impose a ten month bar as requested by the intervener? Answering the last question first, we agree with the respondent's counsel that the Board cannot impose a prospective bar on this applicant. Section 92(2)(i) makes it clear that only an unsuccessful applicant can be prospectively barred. The Board, of course, may refuse to hear subsequent applications filed by other applicants affecting the same employees. But we cannot conclude that the section envisages the imposition of, in effect, a double penalty on an innocent applicant (i.e. a refusal and a bar). It is our opinion that a different applicant who has its application refused under 92(2)(i) cannot properly be characterized as an unsuccessful applicant for the purposes of imposing a bar. The refusal of such an application is to prevent further disruption of bargaining and does not itself amount to a representation proceeding falling within the purpose underlying a bar. Alternatively, the Board would not impose a ten month bar in this situation in any event. For the reasons discussed below, the stipulation of a precise but lesser bar would be inappropriate having regard to all of the circumstances.

29. Attempting to balance all of the factors above, we have come to the conclusion that this application should be entertained. The intervener was unable to cite any previous Board decision refusing to hear a second application where the incumbent trade union had over twelve months of sheltered bargaining, including six months of strike activity, to enter into a collective agreement and in this case a first collective agreement. No earlier case has involved a total passage in time of two years. And, further, in all the earlier cases before the Board, none of the incumbent trade unions had as much time between the two relevant applications as the intervener has had in this case, i.e. almost two months. Admittedly, current discussions were disrupted by the application at hand but we are not satisfied on the evidence, particularly because of the duration of the impasse, that the intervener lacked a reasonable opportunity to bargain. While the Board was initially inclined to refuse to entertain this application for a few weeks, we have come to the conclusion that such an approach would more likely create greater controversy and turmoil between the parties. In fact, the intervener's emphasis on the need for a ten month bar is, in a sense, a reflection of this labour relations reality and a strong indication that even it is unsure of what is reasonable in the circumstances. More importantly, where a dispute has endured as long as this one has and where, as here, there is no previous history of collective bargaining between the parties, the Board is of the view that the greater weight must now be given to an application aimed at testing employee wishes. Also of relevance is the fact that the employer in this case has not engaged in any unfair labour practices prolonging the dispute; in fact, its conduct did not in any way lead to the dismissal of the preceding termination application. With respect to the status of the striking employees, we note that regardless of the outcome of a representation vote they have important statutory protection against both employer and trade union discrimination. At this point in time we do not think their more immediate interests can override the more general concern of ascertaining the wishes of all bargaining unit employees. We also note the applicant's withdrawal, by its counsel at the hearing, of the remarks found in Exhibit 19a.

30. On the issue of the appropriate pre-hearing vote procedure where an applicant has not had its status determined in an earlier proceeding, this panel of the Board specifically endorses the approach adopted in *Emery Industries Limited, supra*. In particular, we are in agreement with the following reasoning found at paragraph 11 of that decision:

We have carefully considered the submissions of the intervener with respect to the jurisdiction of the Board to order a representation vote.



Essentially, the intervener argues that until a trade union establishes its status, it is not entitled to make use of the pre-hearing vote procedure. We cannot accept this contention. There is no reason for according the "status issue" a special significance which removes it from the ambit of a legislative scheme which specifically provides for a resolution of disputed issues after a vote is taken. Of course, if one adopts a strict sentence-parsing" approach, one encounters the word "trade union" before mention is made of such matters as employee status, the appropriate bargaining unit, and membership in the trade union; but, while it may appear that one determination is a condition precedent separate from the next, in our view it is clear, having regard to the purpose and structure of section 8, that the Legislature intended that all of these matters be resolved at a hearing following the vote. The Board cannot certify the applicant union until its trade union status is determined; but we can see no reason for singling out the trade union status issue for special treatment; nor can we discern any labour relations objective which would be served by denying new unions access to the pre-hearing vote procedure. There is no reason why these new unions should be put at a competitive disadvantage vis-a-vis established organizations, and it would require the clearest possible language before the Board would be driven to this conclusion. There may well be cases where the issues raised are of such nature, or complexity, that a pre-hearing vote is inappropriate. Section 8 is framed so that the Board has a discretion to order a pre-hearing representation vote, and Rule 5 of the Rules of Practice regulates the procedure which must be followed when the Board has refused this request. However, there is nothing in the issue of trade union status, per se, which prevents the taking of a vote, nor is there any evidence, in this case, of any other special circumstances which make such vote inappropriate or which justify any interference with the previous Board decision. In our view the Board was entitled to direct the taking of a vote and defer resolution of the trade union status.

If the intervener's submission was correct, it would be difficult to understand how membership evidence in a new trade union could be valid if executed before the trade union had established its status before the Board. However, that conclusion would be circular and entirely defeating of first applications of any kind. See also *Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association* (1972), 26 D.L.R. (3d) 63. We therefore direct a pre-hearing vote be taken and that the ballot boxes be sealed pending a Board determination of the applicant's status as a trade union within the meaning of the Act. In our view, no special circumstances exist to merit another approach. The voting constituency is:

All office and clerical employees of The Ontario Hospital Association within the Municipality of Metropolitan Toronto, save and except section head, manager and co-ordinator, secretaries to those above the rank of supervisor, audio visual staff, sales staff, communications staff, print shop staff, mail room clerks regularly assigned to reading mail, internal auditors, consultants, all employees in the Hospital Employee Relations Services Departmen (including personnel and payroll staff), all

employees of the Investment Services Department, all employees of the Hospital Accident Prevention Department, systems analysts, programmers and all computer operations staff, maintenance engineers, pharmaceutical chemists, students employed during the school vacation periods and persons regularly employed for not more than twenty four hours of less per week.

A labour relations officer is directed to confer with the parties with respect to the date and hour for taking the vote and the number of and locations of polling places. In all other respects, the previous pre-hearing meeting with the parties appears to be adequate. The matter is then to be returned to the Registrar for the conduct of the vote as directed. All employees of the respondent in the voting constituency on the 27th day of February, 1981, who have not voluntarily terminated their employment or who have not been discharged for cause between the 27th day of February, 1981, and the date the vote is taken will be eligible to vote. The Registrar is directed to relist this matter for hearing immediately following the taking of the vote for the purpose of inquiring into the status of the applicant and all other outstanding issues.

31. The Board wishes to thank all three counsel for their very thoughtful arguments and assistance in processing this matter expeditiously.

#### **DECISION OF BOARD MEMBER D. B. ARCHER;**

1. I dissent. On the basis of the facts, which are accurately set out in the decision of the majority, I do not agree that this application should be entertained at this time. As the narration of the facts indicates, one of the major items in dispute, namely union security, was removed from the bargaining table by the coming into effect of Bill 89. With that major obstacle out of the way, the intervener trade union and the respondent were not afforded a reasonable opportunity of engaging in any meaningful negotiations on the remaining issues in dispute, because of the filing of a second application of termination.

2. Admittedly, a long period of time has elapsed without a collective agreement coming into existence. However, the period of time alone is not decisive without regard to the other circumstances. The efforts of the intervener were interrupted by two unsuccessful termination applications. In the light of all these circumstances, I would have held that this application was premature and therefore should be dismissed in accordance with the authority of the Board under section 92(2)(i).

3. I also wish to disassociate myself from the majority's endorsement of the *Emery Industries Limited* principle, which is to the effect that a pre-hearing vote may be directed by the Board prior to the proof of trade union status by an applicant.

4. I disagree with the reasoning in the passage quoted from the *Emery Industries Limited* decision at para 29 of the majority decision, where it states that "there is no reason for according the 'status issue' a special significance which removes it from the ambit of a legislative scheme which specifically provides for a resolution of disputed issues after a vote is taken."

5. There is no question that section 8 of the Act contemplates that the resolution of

issues be postponed until after the vote is held. However, in my view, the status of the applicant is so fundamental that this is not one of the issues that may be postponed under the scheme set out in section 8. Section 8(1) states that “a trade union may request a pre-hearing representation vote be taken.” It is clear that before the Board has jurisdiction to direct a vote under section 8(2), it must be satisfied that the applicant requesting it indeed is a trade union within the meaning of the Act.

6. Besides, it concerns me that the Board is directing employees to vote for or against an entity, which may or may not be in existence. When employees cast their ballots, they will not have any assurance that the applicant is not employer dominated or engaged in discriminatory practices. They will not know whether the applicant has a constitution or whether it has elected officials. On the other hand, there is always the possibility that, from the mere fact that a vote has been directed, employees may assume that the Labour Board has already recognized the applicant as a legitimate trade union.

7. I am of the view that the *Emery Industries Limited* case is wrongly decided. I would have required the applicant to prove status, prior to being entitled to any representation vote. In order not to deny new trade unions access to pre-hearing votes, the Board should devise a method of conducting a quick hearing to dispose of trade union status issues in these circumstances.

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**1987-80-R United Cement Lime & Gypsum Workers International Union, Applicant, v. Pasinato Haulage Inc., Respondent, v. Teamsters Local Union 879, Intervener.**

**Abandonment – Certification – Whether displacement application with respect to dependent contractors timely – Whether incumbent abandoned bargaining rights by ineffective representation**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

**APPEARANCES:** James Hayes and Angelo Natale for the applicant; Paula M. Rusak and L. Pasinato for the respondent; Stanley Simpson and L. Schultz for the intervener.

**DECISION OF THE BOARD; April 1, 1981**

1. The name of the respondent is amended to read: “Pasinato Haulage Inc.”.
2. This is an application for certification for all employees of the respondent hauling materials to and from job sites in the Hamilton-Wentworth and Halton regions. At present, the unit is composed entirely of “dependent contractors”, being individuals who own their own trucks and haul materials for the respondent. The respondent and the intervener Teamsters Local Union 879 take the position that the “employees” who are the subject of this application are already covered by a collective agreement between them.



3. The respondent and the intervener have had a collective bargaining relationship for drivers of the respondent since 1968, and have entered into a series of collective agreements since that date. The parties filed with the Board, for example, a collective agreement covering the period April 1st, 1978 to March 31st, 1980. This collective agreement was renewed, with changes, on July 1st, 1980, and a further collective agreement entered into for the period July 1st, 1980 to June 30th, 1982. Since 1975 at least, the respondent has ceased to employ drivers of its own, and the only employees that it has had are “dependent contractors”.

4. The timeliness of the present application is determined by section 5(1) of *The Labour Relations Act*, which reads:

Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees in the unit are not bound by a collective agreement, a trade union may, subject to section 53, apply at any time to the Board for certification as bargaining agent of the employees in the unit.

At the outset of hearings, the applicant, in response to the argument that the above collective agreement constituted a bar to this application, submitted that the agreement did not apply to “dependent contractors” of the respondent, or alternatively, if it ever did, bargaining rights for the “dependent contractors” have since been abandoned.

5. As the hearings proceeded, the applicant found itself compelled to concede that the collective agreement by its own terms, covers “dependent contractors”. Notwithstanding this, the applicant maintained the position that the intervener had by its conduct and lack of representation abandoned its bargaining rights for “dependent contractors.” The applicant sought to rely, in support of its position, on the line of Board cases which have determined that a trade union, by its own inactivity, has abandoned bargaining rights it once held. In particular, the applicant relied on *O & W Electronics Limited*, [1970] OLRB Rep. Jan. 1213, for the proposition that a collective agreement in itself may be no more than “just a piece of paper”, in the absence of evidence that the trade union party to that collective agreement has in fact actively sought to represent the members of the bargaining unit.

6. The Board is of the view that no allegation of “abandonment” can be raised during the initial term of an otherwise applicable collective agreement, and the applicant has been able to cite no previous case in which the Board has indicated the appropriateness of such an inquiry. If the term of the collective agreement is unreasonably long, the Act provides relief to the employees in the unit and any interested trade union by way of section 5(5), which provides:

Where a collective agreement is for a term of more than three years, a trade union may, subject to section 53, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of the year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be.

The present situation is in no way analogous to the situation in *O & W Electronics* and similar cases where a collective agreement has not been re-negotiated or even re-signed at all for a substantial period of time, and a party or parties to the collective agreement are relying solely on an "automatic renewal" clause providing that if no notice to bargain is given, the agreement renews itself from year to year. In the *O & W Electronics* case, the Board looked for evidence of representation besides the collective agreement only because the collective agreement itself had *not* been re-negotiated over time. As the Board stated:

11. If a trade union fails to act as a bargaining agent and sleeps on *its bargaining rights* for an extended period of time, it may be said to have abandoned its bargaining rights since it is expected that a trade union will actively promote *the bargaining rights* which it has received.

[emphasis added]

The most active form of a trade union promoting its "bargaining rights" is the consummation of a new collective agreement, and where that has taken place, the Board will not (subject to the other provisions of *The Labour Relations Act*) go behind that document during its initial term of operation.

7. The present situation has in fact not changed since at least 1975, when the respondent ceased to hire any of its own drivers, and was the subject of a Board decision referred to as *Abdo Contracting Company Ltd.*, Board File No. 1295-76-U, dated August 30, 1977 and unreported. The present application was not a party to that decision and of course is not bound by anything contained therein. The Board's comments, however, on the plight of the dependent contractors ("owner-drivers") are interesting:

6. The change in Pasinato's business meant that many of the provisions of this collective agreement were simply not applicable. Those provisions dealing with "brokers" remained operative, however, since we interpret the term "broker", as it is used in the collective agreement, as describing owner-drivers such as the complainants. Even these provisions, though, were enforced loosely by the Teamsters, the evidence being that the Teamsters insisted that Pasinato's brokers be members only where they were working on a union job. On the other hand, it would appear that the Teamsters provided virtually no representation to those brokers that did pay dues to them.

...

11. Despite our finding that there has not been a violation of either of these two sections, we consider that some comment should be made about the complainants' situation. It is obvious that the complainants believed that they were getting nothing in return for the dues that they paid to the Teamsters, and there was some evidence before us to indicate that this belief was not unfounded.

If the employees in a bargaining unit are dissatisfied with the level of consultation or representation afforded to them by their bargaining agent, they have their remedies under the Act. One of them is *not* to introduce a new bargaining agent by way of certification in the middle of a fresh collective agreement.

8. The application is dismissed.

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**2679-80-R** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), Applicant, v. **Teledyne Canada Metal Products**, Respondent, v. Group of Employees, Objectors.

**Certification – Petition – Whether statements by employer affecting voluntariness of petition – Whether management letter explaining employees' right under Act affecting petition**

**BEFORE:** Pamela C. Picher, Vice-Chairman, and Board Members M. J. Fenwick and E. C. Went.

**APPEARANCES:** *H. Carl Anderson and Jack Pawson for the applicant; Moira M. Trask and Wallace Nutt for the respondent; Philip Parsons for the objectors.*

**DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER E. C. WENT; April 1, 1981**

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Woodstock, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on March 17, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
5. Two timely statements of desire were filed with the Board in opposition to this application for certification. Given the extent of overlap between persons who signed both the petition and membership cards in the union the petitions would, if proved to be voluntary, cause the Board to exercise its discretion under section 7(2) of the Act and order the taking of a representation vote.
6. The two persons who circulated the petitions, Mr. Philip Parsons and Mr. Alex Thompson, gave evidence as to the origination, preparation, and circulation of the petitions as well as their delivery to the Board. The Board is satisfied on the basis of all the evidence presented that management did not involve itself in the petition. In fact when Parsons asked Mr. Wally Nutt, a member of management, if he knew whether an application for certification had been filed, Mr. Nutt told the petitioner he would have to ask someone else because as a member of management he could not discuss it. On another occasion management was openly impartial as between employees supporting the union and those opposed to the union. A



union supporter approached a supervisor complaining that Parsons, on company time, was trying to get people to sign the petition against the union. The supervisor then told Parsons that he would be subject to discipline if he used company time to organize or circulate a petition in the same way a union supporter would be disciplined if he tried to sign union cards on company time.

7. The union argues that the petition is not voluntary because of statements made by Parsons at a union meeting. Parsons expressed the view that benefits might be cut and that the plant might close for a while if the union got in. He mentioned in particular another Teledyne plant that had closed down for 6 weeks because of bargaining difficulties with the union. Parsons is not a member of management and would not reasonably be perceived by employees as such. Nor, in the Board's view, would he be viewed as having the ear of management. Parsons is a truck driver for the company. The Board concludes on the evidence that the ordinary employee would view the comments made by Parsons as an expression of his personal thoughts and not as a reliable reflection of what management would in fact do if the union got in. Further, these comments were made in an open forum where the union had every opportunity for rebuttal. Accordingly, the Board is satisfied that Parsons' comments at the union meeting do not adversely affect the voluntary nature of the petition.

8. To further support its submission that the petition is not voluntary, the union brought evidence relating to a letter given to each employee by management the day prior to the terminal date. The letter reads as follows:

March 16th, 1981

To: All Teledyne Canada Metal Products Hourly Employees

Dear Employee:

You may have heard of an unfortunate incident which appears to have taken place on Saturday in which one of your fellow employees was allegedly punched by another employee.

The Company views this very seriously and is in the process of investigating this incident. We do not yet know whether the incident arose because of the Union's attempt to organize our plant.

In the meantime, you should know that if the Union organizers, or those against the Union, attempt to intimidate employees, the Labour Relations Board will not tolerate this. The law of Ontario protects both your right to join a trade union, or your right not to join a trade union. Your rights and *true wishes* in this Application for Certification, whatever they may be, will be protected by the law and respected by the Company.

Feelings often run high during union organization attempts. The Company objects to threats, intimidation, fighting, etc. among

employees who are in favour of or against the Union. We must all work together and respect each other's wishes and opinions.

You, as an individual, must make this important decision according to your own convictions knowing that the law protects your right to choose freely.

Sincerely yours,

"A. E. Searls"

Albert E. Searls,  
Plant Manager

AES/sl

9. Prior to the circulation of this letter management had met with the shop committee which is composed of 4 elected employees and the two employees involved in the incident referred to in the letter. They had not completed their investigation of the incident at that meeting. At the end of the meeting, however, management caused the shop committee to believe that the matter would not be openly discussed outside the meeting. Quite understandably, therefore, the member of the shop committee who testified before the Board was upset when he received management's letter to all employees on the subject of the incident.

10. One of the employees involved in the altercation, Mr. James Ford, testified that on the Monday morning following the incident the other employee involved was telling everyone that Ford had hit him because he wouldn't sign a union card. The union argues that the publication of the company's letter in the context of the rumours referred to above had the effect of confirming the rumours instead of quashing them, and thereby adversely affecting the union. In these circumstances the union argues that the petition signatures obtained following the letter would not be voluntary.

11. The Board cannot accept this submission. Notwithstanding rumours which may have been spread around the plant prior to the company's letter, the Board views the letter as evenhanded. It assured all employees that their right to join or not to join a union was protected by the Act and that intimidation by anyone, for or against the union, would not be tolerated. On this basis the Board is satisfied that the employer's letter would not adversely affect an employee's ability to freely express his views.

12. For the reasons set out above the Board finds that the statements of desire filed in opposition to the union's application for certification are voluntary. Accordingly, the Board exercises its discretion under section 7(2) of the Act to order the taking of a representation vote.

13. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

14. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

15. The matter is referred to the Registrar.

**DECISION OF BOARD MEMBER M. J. FENWICK;**

1. I dissent.

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**2120-80-R** Fausto Mazzei, Applicant, v. Retail, Commercial & Industrial Union, Local 206, Chartered by United Food & Commercial Workers International Union, Respondent, v. **Tip Top Tailors**, Intervener.

**Petition – Termination – Bargaining unit employee having “quasi-supervisory” status promoting termination petition – Whether petition perceived as management supported**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and W. R. Rutherford.

**APPEARANCES:** *F. Mazzei for the applicant; R. Levinson and C. McCormick for the respondent; D. L. Brisbin and S. Allen for the intervener.*

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; April 21, 1981**

1. The name: “Retail Clerks Union, Local 206, Chartered by United Foods & Commercial Workers International” appearing in the style of cause of this application as the name of the respondent is amended to read: “Retail, Commercial & Industrial Union, Local 206, Chartered by United Food & Commercial Workers International Union”.

2. This is an application pursuant to section 49(1) of *The Labour Relations Act* for a declaration terminating the bargaining rights of the respondent.

3. The respondent was certified in July of 1979 for a bargaining unit of tailors described as follows:

“all tailors employed by Tip Top Tailors, at its Central Tailoring Shop in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff”.

To date, however, no collective agreement has been reached. In September 1980, a company offer, apparently accepted by the respondent, was put to the membership and turned down (piece-work apparently being the main bone of contention). A “no-board” report was issued



on October 21, but no strike has taken place. The intervener employer subsequently requested that its "final offer" be put to the membership by supervised vote, pursuant to the provisions of section 34e(1) of *The Labour Relations Act*. This offer was rejected by the membership by a count of 14 to 1. The present application was then filed.

4. The evidence discloses that the subject of continued representation by the respondent has been the subject of considerable heated discussion amongst the employees in the shop, at least since the respondent brought back the first settlement proposed by the employer in September. From the numerous employees who testified, it is evident that the shop has split into two rather identifiable camps, for and against the respondent. The petition filed in support of the application contains the names of 8 out of a total of 15 employees. The evidence of the applicant, Fausto Mazzei, is that he did not even bother to approach those employees whom he knew still favoured the respondent.

5. Mr. Mazzei testified that he prepared and circulated the instant petition at the request of employees disgruntled over the lack of a suitable contract, and other employees called by Mr. Mazzei confirmed his evidence in this regard. The company also has tailors employed in its retail stores, which have not been unionized, and the evidence indicated that the employees in the shop felt they were falling significantly behind those in the stores over the two years the statutory freeze was in effect for the shop. The Board notes, however, that there has been no allegation of a failure to bargain in good faith raised against the employer, and the Board is not disposed to speculate in that regard. Indeed, the employer has twice sought to have a collective agreement consummated through ratification votes. The applicant, Fausto Mazzei, was asked on cross-examination if he had been opposed to the union from the start. Mr. Mazzei insisted that he was not, and would have been in favour of the union if he had liked the contract. As will be discussed, Mr. Mazzei's conduct tended generally to reflect this philosophy.

6. Mr. Mazzei was present at a meeting of employees convened by a Mr. Schwartz, representing the employer, for the purpose of explaining the employer's final offer being put to the supervised vote on December 23. When Mr. Schwartz had finished, Mr. Mazzei capitalized on the opportunity to put Mr. Schwartz on the spot, and sought to extract some specific promises from the employer prior to the vote. There are minor variations in the accounts of the various witnesses as to what was said, but even accepting verbatim the version given to the Board by Mr. Alban Joseph, the most vociferous of the union supporters, one finds Mr. Mazzei asking Mr. Schwartz, if the union were out, could they get two years' back-pay like the rest of the stores. Mr. Schwartz indicated he could not answer at that point, but acknowledged that he was aware some of the stores got back-pay. Mr. Mazzei asked, if they got rid of the union, could they get transportation from Kipling Avenue to the shop. Mr. Schwartz said, "we'll see". Mr. Mazzei then asked Mr. Schwartz, if they got rid of the union, could they make a deal with him. Mr. Joseph testified that Mr. Schwartz did not answer that one. Finally, Mr. Mazzei asked, if they got rid of the union, could some of the tailors who wished to do so be transferred to the stores. Mr. Schwartz said, "we'll see".

7. The respondent argues that the above exchange may have been perceived by employees as staged by management, and in any event would constitute an implied promise of benefits. The Board will not characterize it in that way. On the contrary, Mr. Schwartz appears to have been genuinely uncomfortable at the position Mr. Mazzei placed him in, and his answers were as non-committal as one could reasonably ask in the circumstances. More

importantly, the questions put by Mr. Mazzei appeared not to raise new matters, but rather concerns that were already of open concern to the employees in the shop, and Mr. Schwartz's answers, in the Board's view, were such as would provide little comfort to any employee with an interest in the conversation.

8. The real dispute in this case surrounds the status of Mr. Mazzei and his relationship to management, as well as the text of his "campaign" propaganda. As indicated, the employees in the shop appear to be split into two distinct camps, and a number of employees were called to testify from each side. Their respective versions of the evidence had little in common besides the file number, and the Board noted a tendency on both sides to overstate their position. On the one hand, it is ludicrous to suggest that Mr. Mazzei was just another tailor in the shop (even though he did take part in the vote on the company's final offer). Mr. Mazzei sits approximately six feet from the desk of the shop foreman, Mr. Roman Krawec, and clearly assists in the co-ordination and assignment of the work. Notwithstanding the apparent change in practice by the intervener between the two days of hearings, it is also clear that Mr. Mazzei, like Mr. Krawec, is regularly used to verify the performance and time content of work by other tailors for pay purposes, at least on routine types of jobs. When Mr. Krawec went on vacation last year, the Board has little doubt on the evidence that Mr. Mazzei would be the one left "in charge", and this was in fact the case. Conversely, the Board notes that the authorization of routine time-tickets is done as well by the tracer-shipper, who is not suggested to be managerial. Nor does the Board see any additional significance in the fact that Mr. Mazzei "moonlights" as a cleaner, and has the contract to clean up the intervener's premises at the end of the week, or that Mr. Mazzei is usually the first to arrive at the shop in the morning, after dropping his son off at the subway, and has a key to open the shop. On all of the evidence, the Board finds that the respondent is clearly correct in its submission that Mr. Mazzei is a "lead hand" for the shop.

9. This conclusion raises two competing considerations. On the one hand, Mr. Mazzei is an employee in the bargaining unit, and *prima facie* entitled to exercise the rights granted to employees under *The Labour Relations Act*. On the other hand, pro-management activity by an employee enjoying special status, in the absence of other circumstances, can easily be misconstrued by employees as representing the acts of management itself, and the Board must be sensitive to the effect which such activities can have, intentionally or otherwise, on the voluntariness of other employees' acts. The Board grappled with this perplexing problem in the recent *A. N. Shaw & Sons (Eastern) Ltd.* case, [1980] OLRB Rep. Oct. 1347, and articulated its approach in the following terms:

10. In assessing the voluntariness of the statement of desire, we are unable to accept the proposition that Mr. Foley stands in the same position as any other employee in the bargaining unit. Because of his supervisory functions, Mr. Foley's active involvement with the statement of desire raises concerns which would not exist if he were other than a working foreman. However, we also do not believe that his involvement with the statement of desire must invariably result in a finding that it cannot be given any weight. Rather, what is required is an examination of all of the surrounding circumstances and an assessment of whether other employees would likely have viewed Mr. Foley as acting on behalf of, or with the support of management, or whether they would likely have

perceived him as a bargaining unit employee seeking only to further his own self-interests.

In that case, the Board concluded:

11. Employees would have been well aware of Mr. Foley's supervisory role, particularly in assigning work. They would also likely have been aware of the fact that he was responsible for making reports to management concerning their work performance. It is also reasonable to assume that the other employees would have known that notwithstanding his status as a working foreman, Mr. Foley, like themselves, was a union member within the bargaining unit. The evidence does not suggest that Mr. Foley did anything to indicate to the employees that he was acting on behalf of management. To the contrary, his case in favour of terminating the respondent's bargaining rights was based upon his view that union representation had acted to restrict the work available to himself and others. Along with the other employees he had been laid off for five or six weeks under circumstances where he felt he need not have been blamed, and he blamed the existence of the collective agreement for this fact. When all of these considerations are taken into account, we feel that the other employees would more likely have regarded Mr. Foley as acting in what he perceived to be in his own interests rather than acting on behalf of management.

10. In the Board's view, the present facts represent a classic case of a quasi-supervisory employee acting on his own behalf and clearly being perceived in that light. Mr. Mazzei's whole pattern of conduct preceding this application, we find, would leave little doubt in the minds of other employees that, like one of the witnesses supporting the respondent, "it was not a question of the company or the union, it was just a question of money". The Board accepts as well that the movement to eliminate the union did not begin in this case with Mr. Mazzei, but with a dissatisfied group of employees generally. Given Mr. Mazzei's special status, it does not strike the Board as surprising that these employees would look to Mr. Mazzei, as he testified, to lead them in this activity. This case can readily be distinguished from the *General Crane* case, [1974] OLRB Rep. Oct. 662, which involved a lead hand with substantially more authority than Mr. Mazzei, as well as a petition which followed on the heels of a prior petition heavily tainted by management influence. The *Quality Circuits* case, [1979] OLRB Rep. August 794, also commented on the adverse impact participation by a lead hand may have, but unlike the present case, as well as the *A. N. Shaw & Sons (Eastern) Ltd.* case, *supra*, there were no circumstances to rebut the inference that the lead hand was acting at management's behest, rather than on his own behalf. Both these earlier cases were, as well, certification cases, which as the Board has frequently noted, lack the opportunity for intervening circumstances to make the change of heart by employees more credible to the Board (see, e.g. *N. J. Spivak Limited*, [1977] OLRB Rep. July 462, at paragraph 6; and cf. *More Groceteria*, [1980] OLRB Rep. July 1033).

11. On the other hand, the Board does not accept in total the evidence of the respondent's witnesses as to what was said to them by Mr. Mazzei in his efforts to win them over. Rather, the Board notes that Mr. Fera, for example, confirmed what the Board takes to be the main theme of Mr. Mazzei's campaign, which was "two years with nothing", liberally



sprinkled with what Mr. Mazzei believed to be the new rates in the stores. From their testimony it would appear that employees by this time had come to take Mr. Mazzei's overtures with a grain of salt, and also could look to the conversation between Mr. Mazzei and Mr. Schwartz as a more direct insight into the extent of the employer's commitments (in contrast to, e.g. *J. & A. Cartage Ltd.*, [1980] OLRB Rep. March 327). As one of the applicant's witnesses commented: "The company pays us, not Fausto", while the main witness of the respondent on this subject, when asked if he believed Mr. Mazzei's promises, replied without hesitation: "never".

12. The most serious allegation made by the respondent is that Mr. Mazzei, after the petition was filed, admitted to a group of four union supporters that Mr. Krawec (the shop foreman) had told him to take up the petition. Whatever the effect of this might be on the petition itself, Mr. Mazzei strenuously denied this, and the Board finds it highly improbable that Mr. Mazzei would have made this admission to these four avowed union supporters. One of them, Alban Joseph, afterwards asked Mr. Krawec why he told Mr. Mazzei to do this, and Mr. Krawec said that he never did. Mr. Krawec testified that shortly after this incident, he asked one of those in the group, Mr. Fera, why Alban Joseph said that he had told Mr. Mazzei to take up the petition, and Mr. Fera replied: "He was just guessing". Mr. Fera took the stand in reply on this point, and testified that his response to Mr. Krawec was: "I don't know". This strikes the Board as rather a weak denial, particularly from someone who was said to be present when the alleged admission was made. On balance, the Board concludes that the admission was not made.

13. Management in fact appears on the whole to have prudently removed itself from the circumstances surrounding this application. We do not find on the evidence that any attempts were made by management, including Mr. Krawec, to "bribe" employees into signing Mr. Mazzei's petition. The one incident of concern occurred at the time management, at the employees' request, was taking a survey to determine, if transportation service were extended from the nearby East Mall to cover the employees to the West Mall, how many employees would use it. Asked by an employee when this would likely come about, Mr. Krawec imprudently ventured his own opinion that the company would not likely choose to mix union with non-union employees. It is clear that Mr. Krawec himself has no control over such decisions, but coming from someone at Mr. Krawec's level, the statement is nonetheless one which merits serious attention. Looking at all of the circumstances of the case, however, the Board does not conclude that it would not have been this single act of indiscretion, on so minor a point, which caused employees to sign the instant petition.

14. Based on all the evidence, therefore, the Board finds that at least forty-five per cent of the employees in the bargaining unit on the date of this application was made voluntarily signified in writing that they no longer wished to be represented by the respondent. The matter will therefore be put to a representation vote, and all employees can express their wishes by secret ballot. Voters will be asked to indicate whether or not they wish to continue to be represented by the respondent trade union. All employees in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken shall be eligible to vote.

15. The matter is referred to the Registrar.

**DECISION OF BOARD MEMBER W. F. RUTHERFORD;**

1. I dissent.

2. This Tip Top Tailor Shop unit was certified in July 1979. During first-contract negotiations the union was unable to negotiate a satisfactory settlement. Following the procedure of conciliation and then receiving a "No Board" report, the company requested a vote under section 34e of the Act.

3. Mr. Schwartz, management representative, held a meeting of all employees in the shop to explain the company's proposals. A well-orchestrated question-and-answer period took place at the meeting. Fausto Mazzei, the petitioner, who had never been a member of the union, asked the majority of the questions of Mr. Schwartz. The questions asked by Mr. Mazzei were prefaced with "If we get rid of the union" would the company provide increased benefits based on the wages and conditions of the tailors working non-union in the stores.

4. Schwartz was non-committal on what the company would provide if the union was eliminated. But to employees questioned at the Board meeting, Schwartz, in my view, left them with the inference that to eliminate the union could be to their benefit.

5. The company's contract proposals had a piece-work clause opposed by the employees, resulting in a 14 to 1 rejection of the contract.

6. In small units where lengthy negotiations restrict increased earnings until negotiations are completed, it is understandable that a serious division of employees in the tailor shop could occur.

7. The Dylex Corporation through hard bargaining on a first agreement created the division of employees in the tailor shop. Fausto Mazzei, a non-union employee in a favoured position with the company, initiated the petition, asking only enough employees to make possible an application for decertification.

8. I would have rejected the petition as being a concerted move on the part of the company through its bargaining policy to allow an employee, perceived by the other shop employees as having a position with management that could affect their employment, to bring about a decertification.

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**2262-80-M; 2263-80-M; 2264-80-M; 2265-80-M; 2266-80-M; 2267-80-M; 2268-80-M; 2269-80-M; 2270-80-M; 2271-80-M; 2272-80-M; 2273-80-M; 2274-80-M; 2275-80-M; 2276-80-M; 2277-80-M; 2522-80-M:** The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463, Applicant, v. **Watts & Henderson Limited, et al** Respondent.

**Section 112a – Failure to pay proper zone area incentive allowance as per provincial agreement alleged – Memorandum of agreement increasing travel expense payments – Whether in addition to hourly rate increase in agreement**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members C. A. Ballentine and J. Wilson.

***APPEARANCES:** A. M. Minsky, Tom Berry and Chris Burrows for the applicants; G. Grossman, J. McCarron and G. Opacic for all of the respondents except Newmarch Mechanical Limited and The Clarkson Company Ltd.*

**DECISION OF THE BOARD;** April 15, 1981

1. These are a number of grievances referred to the Board for final and binding determination pursuant to the provisions of section 112a of *The Labour Relations Act*.
2. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 ("Local 463") is a member local of the Ontario Pipe Trades Council. The Local has jurisdiction in part of the province referred to as "Zone 12 - West". The Ontario Pipe Trades Council bargains with the Mechanical Contractors Association of Ontario, a designated employer bargaining agency which represents in bargaining each of the respondent employers.
3. Each of the grievances before the Board alleges that the employer involved has violated the terms of a provincial agreement between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council "by failing or refusing to pay to its said employees the proper zone area incentive allowance at the rate of thirty-four and one-half cents (34.5¢) per hour for each hour worked by each of them in Zone 12W contrary to the provincial agreement and Appendix 12W (Local 463) hereto."
4. At one time Local 463's activities were limited to the area around Port Hope. However, in 1974 a sister local in Peterborough and another sister local in Oshawa merged with Local 463. Prior to the merger, each of the three locals had negotiated a system whereby around its "home" city or town there was a "free zone" such that if a member of the local was assigned to work in the free zone his employer was not required to pay him an allowance for travel from his home to the job site. Travel beyond the free zone, however, led to the payment of a travel allowance to the employee. Although the evidence on this point is not entirely clear,



it appears that the travel allowance was calculated at so many cents per mile from the edge of the free zone to the work site.

5. Subsequent to the merger of the three locals, Local 463 bargained a single collective agreement with a local contractors' association, the Mechanical Contractors Association of Zone 12 - West. During negotiations the parties agreed to a novel approach to the issue of pay for travel. A new "zone" was created which covered a wide geographical area, including Oshawa, Peterborough and Port Hope. The zone itself was described in terms of four intersecting circles. Travel from an employee's home to a job site anywhere within the zone did not lead to the payment of any travel pay for the employee. However, in return, the wage package for all employees was increased by a "zone incentive" of fifteen cents per hour. Over a period of time, the fifteen cents per hour was raised to twenty-two cents per hour. The assignment of an employee to a job outside the single large zone did not lead to the payment of any travel allowance but, rather, to the payment of a board allowance.

6. When the system of provincial bargaining was introduced a first provincial agreement was entered into between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council, stated to run from June 15, 1978 to April 30, 1980. The agreement contained various appendices setting forth the terms and conditions of various "zones" in the province, including an appendix for Zone 12 - West. The relevant provisions of the Zone 12 - West appendix are as follows:

1. RATE OF WAGES-LOCAL 463	June 15/78	May 1/79
Base Rate	11.83	12.39
Vacation Pay 4%)		
Statutory 6% )	1.18	1.24
Welfare	.51	.51
S.U.B.	.15	.15
Ret. Child	.01	.01
Supp. Field Dues	.126	.126
Ontario Pipe Trades P.F.	.01	.01
Pension	.52	.52
Zone Incentive	.22	.22
Training	.01	.05
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TOTAL	14.566	15.216
Zone Administration	.10	.10
	<hr/>	<hr/>
	\$14.666	\$15.316

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#### I & J                      ZONE AREA INCENTIVE

1. Travel within the following intersected circles shall be paid at the rate as shown in the wage schedule:

(a) a 20 mile radius drawn around Oshawa City Hall.

- (b) a 25 mile radius drawn around Peterborough City Hall from true south 180 degrees through west to true north.
  - (c) a 15 mile radius drawn around Peterborough City Hall from true north 180 degrees through east to true south.
  - (d) a 15 mile radius drawn around the present location of Local 463 Union Hall.
2. An employee required to work outside the area as defined in 1. shall be paid a board allowance of \$18.00 per day worked. Employees shall have the right to choose their own accomodation.
  3. An employee required to work any part of a week in an area where board is to be paid shall be paid actual cost of room and board upon presentation of documented receipts up to \$90.00 per week maximum.
  4. When an employee is transferred between jobs during working hours and provides his own transportation, he shall be reimbursed a sum of, effective June 15, 1978, 20c per mile, and effective May 1, 1979, 22c per mile in addition to his regular hourly rate. Employees shall not be required to transport tools or materials in their own vehicles.

7. It should be noted that the provincial agreement contained a "zone incentive" as part of the wage rate only for Zone 12 - West. All of the other zones appear to have a "free zone" along with either a mileage rate for travel outside the free zone, or a series of zones outside the free zone with a daily rate attached to each of them. An example of this latter type of situation was set forth in the provincial agreement for the Niagara region as follows:

#### TRAVEL ALLOWANCE

1. A free travel zone, within the following boundaries, shall be established:

The Westerly boundary of the free zone will be a straight line running generally north and south along Regional Highway 24 (old Townline), extended northerly to Lake Ontario west of Jordan Harbour and southerly to a point west of Burnaby at Long Beach. The northerly boundary will be Lake Ontario, the southerly boundary Lake Erie and the easterly boundary the Niagara River. All Regional Niagara east of the above North/South line will be in the free zone.

2. Travel time and transportation shall not be payable for work performed within the above zone.
3. For work performed outside this zone the following amounts would

be paid for transportation and travelling time. In going to work outside the free zone and returning daily, the workman shall be on the job at the regular starting time and work a full regular shift (Article 29):

The zone boundaries will be north-south lines running parallel to the westerly boundary of the free zone referred to in 1.

0 - 5 miles beyond westerly boundary \$5.50 per day  
 5 - 10 miles beyond westerly boundary \$7.00 per day  
 10 - 15 miles beyond westerly boundary \$8.00 per day  
 15 - 20 miles beyond westerly boundary \$9.00 per day

For the purpose of this Agreement Port Maitland is to be included in 15 - 20 mile zone.

4. Established companies located outside the Free Zone specified above shall have a free zone of ten (10) miles radius from the centre of the cities in which they are located.

8. On May 25, 1980 the Mechanical Contractors Association of Ontario and The Ontario Pipe Trades Council entered into a memorandum of agreement with respect to the terms of a new provincial agreement. The parties are in agreement that the memorandum of agreement when read together with the 1978-80 provincial agreement, constitutes a new provincial agreement. The relevant provisions of the memorandum of agreement state as follows:

### **Monetary Increase**

Applicable to each local Appendix, the total hourly rate increase shall be:

Effective on May 21, 1980 : \$1.40  
 Effective on May 1, 1981 : \$1.10

It is agreed that this monetary package is a "gross" package, all inclusive as to base rate, vacation and statutory holiday pay, and fringe benefits including training and union funds.

It is agreed that Foremen's wage shall retain the same percentage increase as it relates to the basic journeyman rate currently in each local Appendix.

Travel Allowance Mileage: where applicable, the rate to be paid for mileage shall be increased by five (5) cents per mile; and, where applicable, daily maximum travel allowance shall be increased correspondingly, effective on May 21, 1980. Not applicable to Sarnia see page 3.

Travel Allowance Zones: where applicable, the travel expense per zone shall be increased by one (1) dollar, effective on May 21, 1980.



Board Allowance: where applicable, there shall be an increase in the Board Allowance of two (2) dollars per day worked, effective on May 21, 1980, and effective May 1, 1981, three (3) dollars.

9. The 1978-80 provincial agreement provided that in Zone 12 - West an employee transferred between jobs during working hours should be reimbursed twenty-two cents per mile in addition to his regular hourly rate. In accordance with the provisions of the memorandum of agreement, the respondents have apparently all increased this amount by five cents a mile. All of the respondents have also apparently increased the hourly rate by \$1.40 per hour and the board allowance by \$2.00 per day. Local 463, however, contends that in addition to these changes its members should also be receiving the increase of \$1.00 in the travel expense per zone.

10. On June 12, 1980 Mr. Chris Burrows, the business manager of Local 463, sent to the secretary-manager of the Mechanical Contractors Association of Zone 12 - West a letter indicating that in his view the memorandum of agreement had the effect of raising the zone incentive from twenty-two cents per hour to \$1.22 per hour, and that this was to be on top of the hourly rate increase of \$1.40 per hour. On August 20, 1980, Mr. Burrows revised this stand and took the position that the dollar increase in travel expense per zone should be interpreted to mean an increase in the zone incentive in Zone 12 - West of twelve and one-half cents per hour. The twelve and one-half cents per hour was calculated by dividing the one dollar by eight hours in a working day. This was also the position taken by the applicants at the hearing, although with the proviso that the applicants were not claiming the the extra twelve and one-half cents for any time worked by an employee in excess of eight hours in a day.

11. In our view, the grievances must all fail. The 1978-80 provincial agreement expressly included the Zone 12 - West zone incentive as part of the total wage rate along with vacation pay, statutory holiday pay, and so on. The memorandum of agreement stipulates that the \$1.40 per hour increase on May 21, 1980 along with the increase of \$1.10 per hour scheduled for May 1, 1981 was to be a "gross" package "inclusive as to the base rate, vacation and statutory holiday pay, and fringe benefits including training and union funds". In our view, since the Zone 12 - West zone incentive was in the 1978-80 provincial agreement listed under the wage rate heading, it was treated by the parties as a fringe benefit and, as such, was not meant to be increased in addition to the \$1.40/\$1.10 per hour rate increase.

12. This conclusion is supported by the manner in which the applicants have sought to artificially bend the language of the memorandum of agreement so as to attempt to bring themselves within its provisions relating to travel expenses. The wording of the memorandum is that "where applicable, the travel expense per zone shall be increased by one dollar". In dealing with travel zones in other areas, such as the Niagara area referred to above, this provision is easily applied. Under the 1978-80 provincial agreement when an employee in the Niagara area was sent to a job site up to 5 miles beyond the free zone, he was entitled to receive \$5.50 per day, while if he was sent to a site 5 to 10 miles away he was entitled to receive \$7.00 per day, and so forth. Under the memorandum of agreement these amounts have simply been increased by a dollar. However, to seek to apply the clause to Zone 12 - West, the applicants have been required to try to translate the dollar into a twelve and half cents per hour figure, except for overtime hours, and presumably with some adjustment for employees who work less than eight hours per day. In this regard it is of interest to note that article 29.1 of the Zone 12 - West appendix provides that the ordinary hours of work on Friday shall be from 8:00 a.m.

to 12:00 noon. Further, if the applicants' position is to be accepted, travel pay would be paid to all employees, even those who are not required to travel any appreciable distance from their homes. In our view, the interpretation being argued for by the applicants cannot reasonably be placed on the words actually used in the memorandum of agreement.

13. This is not to say that we do not sympathize with the situation in which members of Local 463 now find themselves. Some years back Local 463 bargained out the more traditional forms of travel compensation for an increase in their hourly wage rate. When the provincial memorandum of agreement was entered into, employees in other parts of the province who received mileage from set points of a job site received an increase of five cents per mile. Employees who received travel expense per mile on a zone basis for jobs distant from their homes and outside a free zone received an increase of one dollar per day per zone. The members of Local 463, however, (apart from an increase for mileage between job sites and an increase in board allowance) who worked under their own rather unique system received nothing in addition to the \$1.40 and soon to be implemented additional \$1.10 per hour rate increase. It may well have been that the parties who negotiated the memorandum of agreement simply overlooked the particular circumstances of Zone 12 - West. However, in dealing with these grievances we lack the authority to amend the agreement entered into between the parties and, as already indicated, we are satisfied that the agreement between the parties cannot reasonably be interpreted to include a twelve and a half cent an hour increase to the zone incentive in Zone 12 - West. Accordingly, the grievances are hereby dismissed.

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**2699-80-R** Service Employees International Union, Local 183 A. F. of L., C.I.O., C.L.C., Applicant, v. **Westgate Nursing Home Inc.**, Respondent, v. Group of Employees, Objectors.

**Membership Evidence – Practice and Procedure – Union applying for certification for full-time unit – Later applying for part-time unit – Whether Board granting request to transfer membership evidence from first application to part-time application – Whether new Form 8 required for second application**

**BEFORE:** R. D. Howe, Vice-Chairman, and Board Members J. Wilson and H. Kobryn

**APPEARANCES:** *C. M. Mitchell, P. Marier and J. Nicholls for the applicant; K. W. Kort and R. Bond for the respondent; James O'Brien for the objectors.*

**DECISION OF THE BOARD;** April 15, 1981

1. This is an application for certification.
2. The name: "Westgate Lodge Nursing Home" appearing in the style of cause of this application as the name of the respondent is amended to read: "Westgate Nursing Home Inc."
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

4. Having regard to the agreement of the parties the Board further finds that all employees of the respondent in Belleville, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except graduate and registered nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. This application for certification as bargaining agent for the part-time (and student) employees of the respondent was filed with the Board on March 9, 1981. In an earlier application filed with the Board on February 25, 1981, (File No. 2604-80-R), the applicant applied for certification as bargaining agent for the full-time employees of the respondent. The Form 1 Application for Certification filed in the present proceedings contains a request that the Board transfer from the full-time application any cards applicable to the part-time bargaining unit.

6. Part-time employees are employees who are regularly employed for not more than twenty-four hours per week. In determining whether an employee is regularly employed for not more than twenty-four hours per week, the Board generally looks to the period of seven weeks immediately prior to the date of the application as a representative period in which to assess the number of hours worked by employees. If during four or more of the seven weeks examined a person works for not more than twenty-four hours per week, the person will generally be found by the Board to be a part-time employee (see *Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116; *Ian Douglas Ltd. trading as Dryden Cleaners & Launderers*, [1971] OLRB Rep. Mar. 135; and *Sydenham District Hospital*, [1967] OLRB Rep. May 135). Thus, in disputed cases, the Board generally assigns an officer to examine the records of the employer to determine how many hours each employee in question worked in each of the seven (weekly) pay periods immediately preceding the date of the application. The use of data concerning hours worked taken from the employer's (weekly) pay records expedites the process by minimizing the calculations necessary to obtain the necessary information (since all employers are required by section 11 of *The Employment Standards Act, 1974* S.O. 1974, c. 112, as amended, to make complete and accurate records in respect of each employee showing information including the number of hours worked by the employee in each week). By adopting the seven week rule, the Board has sought to assist the parties appearing before it in reaching agreement on the status of employees as full-time or part-time, and to permit the parties to know in advance with a reasonable degree of certainty which employees will be affected by a particular certification application. The seven week period is a guideline, not a "hard and fast rule". Thus, if the seven week period is found to be "unrepresentative" of the nature of an employee's status (due to circumstances such as illness, accident or leave of absence), the Board may select another period of time that is more representative (see *Holiday Inn Yorkdale - Commonwealth Holiday Inns of Canada*, [1976] OLRB Rep. Nov. 709). However, as stated in *Trenton Memorial Hospital*, *supra*, at para. 7, "there is a substantial onus on any party requesting that the Board depart from procedures like the seven week guideline that are known, accepted and relied on by union and employers alike".

7. The application of the seven week rule to this application has resulted in two employees being included on Schedule B of the list filed in this application (i.e. the schedule listing all employees regularly employed for not more than twenty-four hours per week) who are also included on Schedule A in the list filed in the earlier (full-time) application (i.e. the schedule listing all employees regularly employed for more than twenty-four hours per week).



who were actually at work on the day of the application). Thus, the two employees in question were full-time employees as of February 25, 1981, but had become part-time employees by March 9, 1981.

8. Counsel for the respondent submitted that the employees in question, and any membership card or cards pertaining to them, should be counted in only one application, since it would “smack of unfairness” for a membership card, or a person who had not signed a membership card, to be counted twice. He further submitted that their inclusion in one of the two applications should be determined on a chronological basis. Accordingly, it was his position that the employees in question, and any membership card or cards pertaining to them, should be included for purposes of the count only in File No. 2604-80-R (the full-time application) since that application was filed prior to the instant (part-time) application. Counsel for the objectors also submitted that the persons in question, and any membership evidence pertaining to them, should be considered only in relation to one application, not both. In support of his position, he contended that a membership card could not be in two files simultaneously. Thus, he argued that a membership card can only be applied to one to the two applications pending before the Board.

9. Counsel for the applicant submitted that the employees in question, and any membership card or cards pertaining to them, should be included in both applications for purposes of the count. He noted that such an approach is essentially neutral in that it could benefit the applicant in some cases (where both employees had signed cards), benefit neither party in other cases (where only one of the two employees had signed a card), or benefit the respondent in still other cases (where neither employee had signed a card). Thus, he contended that there was no reason for the Board to depart from its normal approach in either application.

10. Having regard to the submissions of the parties, the Board is of the view that there is no need to depart from the normal application of its seven week rule in the circumstances of this case. The fact that the application of the rule will result in some persons being found to be part-time employees for the purposes of this application who are full-time employees for the purposes of the earlier application merely reflects the fact that a “person may move from a *full-time* bargaining unit to a *part-time* bargaining unit depending on what period of time is considered” (see *Sydenham District Hospital, supra*, at paragraph 6). The application of this approach causes no injustice since the two persons in question will be included in the denominator of the respective fractions used to determine the respective membership percentages in the full-time and part-time applications, regardless of whether both, either, or neither of them signed membership cards in the applicant. Moreover, (subject to the unfair labour practice provisions of the Act, *The Employment Standards Act, 1974*, and any contractual limitations) an employer is free to determine the number of hours which an employee will be assigned to work in any particular week. Thus, it is the employer’s assignment of working hours to a particular employee which ultimately results in the classification of that employee as full-time or part-time for the purposes of a particular certification application.

11. The Board has an established practice of transferring membership evidence to a certification application from a previous application for certification at the request of the applicant, provided the request is made on or before the terminal date of the (subsequent) application (see *Precision Automotive Co. Limited*, [1967] OLRB Rep. Nov. 741; *Joffe Lapointe & Sons Limited*, [1971] OLRB Rep. Sept. 621, 626 and 629; *A.P. Woodworking*

*Shop*, [1967] OLRB Rep. May 153; and *Falconbridge Nickel Mines*, [1966] OLRB Rep. July 258 and 259). Although such transfer is generally made in a situation in which the prior application has been disposed of, there is nothing to preclude such transfer at a time when both files are pending before the Board. The transfer does not result in the cards becoming inapplicable to the previous file; rather it results in the cards being applied to each file in succession. Accordingly, in the present case all applicable cards will be applied first to the full-time application and then to the part-time application. To do otherwise could result in a substantial injustice to the applicant since it could result in the transferred cards being applied to only one of the two files despite the fact that the names of some of the persons who signed cards might be included in the employer's respective lists in both files for purposes of the count.

12. An applicant who requests the Board to transfer membership evidence from one certification application to another must file with the Board in the latter application a Form 8 Declaration concerning the transferred membership documents (see *Joffre Lapointe & Sons Limited*, *supra*, and *A.P. Woodworking Shop*, *supra*). Although the applicant in the present case filed a Form 8 Declaration in respect of the two new membership cards submitted with this application, no Form 8 Declaration has been filed in this application in respect of the seven membership cards transferred from File No. 2604-80-R. Although Rule 6 requires such declaration to be filed not later than the second day after the terminal date for the application, Rule 57(2) empowers the Board to enlarge the time prescribed for filing such declaration. Generally the Board will excuse late filing of such declaration by permitting it to be filed at the hearing. See, for example, *The Intelligencer*, [1976] OLRB Rep. Mar. 120, in which the Board stated (at paragraph 11):

"...The Board has the authority under Rule 57(2) to enlarge the time prescribed by section 6 of the Board's Rules of Procedure to permit the late filing of a Form 8 and has done so on a number of occasions. (See *Sovereign Construction Company Limited* case [1966] OLRB Rep. Sept. 422, *Friedsman Department Store* [1969] OLRB Rep. Sept. 794, *Dominion Bridge Company Limited* [1970] OLRB Rep. Apr. 57) The Board's approach to the question of the late filing of Form 8 has been expressed in the *Canadian General Tower Limited* [1968] OLRB Rep. Oct. 715 wherein the Board stated:

'Since Form 8 identifies and substantiates the documentary evidence of membership which has been previously filed, this type of evidence is acceptable at the hearing of an application pursuant to the provisions of section 48(2).

The Board's Rules of Procedure are not designed as obstacles placed in the path of parties to a proceeding, but are intended to permit the Board to administer the Labour Relations Act in a manner whereby one party will not be able to unfairly gain a procedural advantage over the other to the prejudice of the other party. The Board's primary function in an application for certification is to determine the true wishes of the employees in the bargaining unit in the exercise of their right to choose a bargaining agent. This function is not properly exercised if the Board refuses to

make the determination of technical irregularity which in no way creates an unfair advantage prejudicial to the rights of a party or prevents the Board from properly assessing the evidence.' "

(Cf. *Wiltshire Catering Division of J.V. Wiltshire Ltd.*, [1975] OLRB Rep. Dec. 916.)

13. Having regard to all of the circumstances, including the fact that the stage of the hearing at which the other parties are given an opportunity to inspect the applicant's Form 8 Declaration(s) has not yet been reached in this case due to the dispute concerning the matters dealt with in this decision, the Board will enlarge the time prescribed for filing the Declaration (concerning the transferred cards) to permit the applicant to file it at the first day of continuation of hearing of this matter.

14. The respondent has alleged that the membership evidence filed in support of this application was obtained in whole or in part by intimidation or coercion on the part of the organizers. Since similar allegations have been made by the respondent in relation to the membership evidence filed in the full-time application (File No. 2604-80-R), the parties have agreed that all of the applicable evidence heard or to be heard by the Board in the full-time application is to be applied by the Board to the part-time application, and vice versa.

15. This matter is referred to the Registrar to be listed for continuation of hearing in Belleville on June 1, 2, and 3, 1981.

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## APPLICATIONS DISPOSED BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1981

### BARGAINING AGENTS CERTIFIED

#### No Vote Conducted

**0160-79-R:** Labourers' International Union of North America, Local 183, (Applicant) v. PHI International Inc., Farlo Associates Ltd., and East River Construction Limited, (Respondents).

Unit: "all construction labourers of the respondent employed in residential construction, save and except labourers employed as bricklayers' helpers and plasterers' helpers and persons above the rank of non-working foremen in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, (Board area #8)." (13 employees in unit).

**0993-79-R:** United Food and Commercial Workers International Union, AFL-CIO-CLC, (Applicant) v. Research Foods (1976) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "All employees of the respondent in Metropolitan Toronto, save and except supervisor, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (28 employees in the unit).

**1275-79-R:** Ontario Taxi Association 1688 Canadian Labour Congress, (Applicant) v. Windsor Airline Limousine Services Limited carrying on business as Veteran Cab Company, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all owner-operators employed by the respondent in Windsor, save and except supervisors and persons above the rank of supervisor." (90 employees in unit) (*Clarity Note*)

Unit #2: "all drivers employed by the respondent in Windsor, save and except supervisors and persons above the rank of supervisor." (90 employees in unit).

**1391-79-R:** Ontario Taxi Association 1688 Canadian Labour Congress, (Applicant) v. Windsor Airline Limousine Services Limited carrying on business as Veteran Cab Company, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all owner-operators employed by the respondent in Windsor, save and except supervisors and persons above the rank of supervisor." (150 employees in unit) (*Clarity Note*)

Unit #2: "all drivers employed by the respondent in Windsor, save and except supervisors and persons above the rank of supervisor." (150 employees in unit).

**0153-80-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. H. G. Francis and Sons Limited, (Respondent).

Unit: "all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (18 employees in the unit).



**0309-80-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Warren Bitulithic Limited, (Respondent).

Unit: "all employees of the respondent working in the Regional Municipality of Waterloo except of Beverly Township annexed by North Dumfries Township, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit). (*Clarity Note*)

**0482-80-R:** Labourers' International Union of North America, Local 506, (Applicant) v. The Georgian Building Corporation, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements, certificates of The Labour Relations Board or written voluntary recognition agreements." (4 employees in unit).

**0815-80-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. The UCS Group Limited, (Respondent).

Unit #1: "all employees of the respondent at its retail stores in the Regional Municipality of Ottawa-Carleton, save and except store manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (5 employees in the unit).

Unit #2: "all employees of the respondent at its retail stores in the Regional Municipality of Ottawa-Carleton regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except store managers and persons above the rank of store manager." (21 employees in the unit).

**0816-80-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. The UCS Group Limited, (Respondent).

Unit #1: "all employees of the respondent at its retail stores in the Regional Municipality of Ottawa-Carleton, save and except store managers, persons above the rank of store manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (45 employees in unit).

Unit #2: "all employees of the respondent at its retail stores in the Regional Municipality of Ottawa-Carleton regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except store managers and persons above the rank of store manager." (26 employees in the unit).

**0885-80-R:** The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 527, Kitchener, (Applicant) v. Frank Vespi Construction Ltd., (Respondent) v. Ontario Pipe Trades Council, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Intervener).

Unit #1: "all plumbers and plumbers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers and plumbers' apprentices in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: “all plumbers and plumbers’ apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**0959-80-R:** Labourers’ International Union of North America - Local 183, (Applicant) v. Community Nursing Homes Limited, (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (15 employees in unit).

**0981-80-R:** Labourers’ International Union of North America - Local 183, (Applicant) v. Columbia Drain & Concrete Contractors Ltd., (Respondent).

Unit: “all cement masons, cement masons’ apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

**1139-80-R:** Labourers’ International Union of North America, Local No. 506, (Applicant) v. Grainger Irrigation, (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

**1366-80-R:** Labourers’ International Union of North America - Local 183, (Applicant) v. Fieldgate Homes, (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (10 employees in unit).

**1372-80-R:** United Food and Commercial Workers International Union, Local 633, AFL-CIO-CLC, (Applicant) v. Thorold IGA Market, (Respondent) v. Group of Employees, (Objectors).

Unit: “all meat department employees of the respondent in its stores in the Municipality of Thorold, save and except the meat manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (7 employees in unit).

**1528-80-R:** United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Electrohome Limited, (Respondent).

Unit: “all employees of the respondent in Peterborough, save and except the service secretary, the manager, persons above the rank of manager and marketing representative.” (7 employees in unit). (*Having regard to the foregoing*).

**1533-80-R:** Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (AFL-CIO-CLC), (Applicant) v. Oshawa This Weekend, Divisions of Inland Publishing Co. Limited, (Respondent).

Unit: "all employees in the editorial department of the respondent in Oshawa, save and except the publisher, editor, news editor, chief photographer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the foregoing*).

**1540-80-R:** Ontario Nurses' Association, (Applicant) v. Manitoulin Health Centre, (Respondent).

Unit #1: "all registered and graduate nurses employed by the respondent at Little Current in a nursing capacity, save and except supervisors and persons above the rank of supervisor." (6 employees in unit).

Unit #2: "all registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week in a nursing capacity by the respondent at Little Current, save and except supervisors and persons above the rank of supervisor." (10 employees in unit).

**1565-80-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Valley Blades Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Waterloo, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (36 employees in unit). (*Having regard to the agreement of the parties*).

**1597-80-R:** Canadian Union of Public Employees, (Applicant) v. The Aurora Public Library Board, (Respondent).

Unit #1: "all employees of the respondent in the Town of Aurora save and except chief librarian, secretary to the chief librarian, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and pending the resolution of the status of these categories excluding as well the head of technical services and the children's services co-ordinator." (8 employees in unit).

Unit #2: "all employees of the respondent in the town of Aurora regularly employed for not more than 24 hours per week and students employed during the school vacation period." (12 employees in unit).

**1724-80-R:** Office and Professional Employees International Union, (Applicant) v. Union du Canada Assurance-vie, (Respondent).

Unit: "all employees of the respondent in the City of Ottawa and the City of Vanier, save and except director of group insurance, department manager, manager of services to the insured, superintendent of ordinary agencies, manager of computer services, actuarial manager, manager of auxiliary services and agents, manager selection of risks, manager accountant, superintendent of training, mortgage manager, director of administration and finance, director of sales, persons above the rank of director and manager, agents and brokers, security guards, building superintendent, persons employed in the maintenance department, secretary to the president, and students employed during the school vacation period." (75 employees in unit). (*Having regard to this agreement*).

**1729-80-R:** Labourers' International Union of North America - Local 183, (Applicant) v. Milne & Nicholls Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).



**1971-80-R:** The Canadian Union of Public Employees, (Applicant) v. The Smith Hospital Limited, (Respondent).

Unit: "all office and clerical employees of the respondent in Hawkesbury, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the administrator, secretary to the Director of Nursing, and secretary to the personnel office." (15 employees in unit). (*Clarity Note*).

**2210-80-R:** United Electrical, Radio and Machine Workers of America (E), (Applicant) v. Westinghouse Canada Inc. Control Products Plant Switchgear & Control Division, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Perth, Ontario, save and except unit managers (foremen), persons above the rank of unit manager (foreman), office, clerical, and sales staff, engineering staff, and students employed during the school vacation period." (60 employees in unit).

**2211-80-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Harwin Hardox Limited, (Respondent).

Unit: "all employees of the respondent working in St. Catharines, Ontario, save and except foreman, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

**2359-80-R:** United Steelworkers of America, (Applicant) v. Storwall International Inc., (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent in Pembroke, Ontario, save and except Secretary to the General Manager, Secretaries in the Personnel Department, and Accountant, Supervisors, persons above the rank of supervisor and outside sales staff." (39 employees in unit). (*Having regard to the agreement of the parties*).

**2379-80-R:** Bethesda Service Employees Association, (Applicant) v. Bethesda Home for the Mentally Handicapped Inc., (Respondent).

Unit: "all employees of the respondent in the Town of Lincoln, save and except supervisors, persons above the rank of supervisor, registered nurses, office and clerical staff, temporary (relief) employees, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation periods and contract personnel." (76 employees in unit). (*Having regard to the agreement of the parties*).

**2385-80-R:** International Union of Allied, Novelty and Production Workers, Local 905, (Applicant) v. Lesney Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foreman, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (22 employees in unit). (*Having regard to the agreement of the parties*).

**2398-80-R:** Graphic Arts International Union, Local #28-B, (Applicant) v. The Ontario Jockey Club, (Respondent).

Unit: "all employees of the respondent engaged in Pre-Press, Press and Finishing operations of the Printing department in Ontario, save and except the foreman, persons above the rank of foreman, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, office and sales staff, persons covered by subsisting collective agreements and persons covered under a Certificate issued by the Ontario Labour Relations Board, File No. 1503-80-R." (11 employees in unit). (*Having regard to the agreement of the parties*).

**2399-80-R:** United Food and Commercial Workers International Union, Local 175, (Applicant) v. National Grocers Co. Ltd., (Respondent).

Unit: "all employees of the respondent in its stores in the Municipality of St. Catharines, save and except meat department employees covered by the certificate issued in Board File No. 2400-80-R, store manager and persons above the rank of store manager." (10 employees in unit). (*Clarity Note*).

**2400-80-R:** United Food and Commercial Workers International Union, Local 633, (Applicant) v. National Grocers Co. Ltd., (Respondent).

Unit: "all meat department employees of the respondent in the Municipality of St. Catharines, Ontario, save and except persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (2 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2401-80-R:** United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Jadee Meat Products Limited, (Respondent).

Unit: "all employees of the respondent at Beamsville, Ontario, save and except foremen, and persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (26 employees in unit). (*Having regard to the agreement of the parties*).

**2402-80-R:** United Steelworkers of America, (Applicant) v. TC Industries of Canada Ltd., (Respondent).

Unit: "all employees of the respondent in Guelph, save and except foremen, persons above the rank of foreman, office, clerical and technical employees, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*).

**2413-80-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Empire Hotel Company of Timmins Limited, (Respondent).

Unit #1: "all employees of the respondent at Sault Ste. Marie, Ontario, save and except managers, persons above the rank of manager, office staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (44 employees in unit). (*Having regard to the agreement of the parties*).

Unit #1: "all employees of the respondent at Sault Ste. Marie, Ontario, regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period save and except managers, persons above the rank of manager and office staff." (29 employees in unit). (*Having regard to the agreement of the parties*).

**2414-80-R:** Retail, Wholesale and Department Store Union, (Applicant) v. Stedmans, Division of MacLeod-Stedman Inc., (Respondent).

Unit: "all employees of the respondent at Cochrane, regularly employed for not more than twenty-four (24) hours per week, save and except managers, persons above the rank of manager, office staff and lunch counter supervisor." (4 employees in unit). (*Having regard to the agreement of the parties*).

**2415-80-R:** Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Applicant) v. Ronald Williams Industrial Contractors Inc., (Respondent).

Unit: "all employees of the respondent in the Municipal Township of Sarnia, save and except foremen, persons above the rank of foreman, office and clerical staff, draftsmen, watchmen, guards and persons engaged in field fabrication work." (8 employees in unit).

**2417-80-R:** Canadian Paperworkers Union, (Applicant) v. Buntin Reid Paper Division of Domtar Inc., (Respondent).

Unit: "all employees of the respondent at London, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (5 employees in unit). (*Having regard to the agreement of the parties*).

**2450-80-R:** Canadian Union of Public Employees, (Applicant) v. St. Vincent de Paul Hospital, (Respondent).

Unit: "all paramedical employees regularly employed by the respondent, in Brockville, Ontario, save and except department heads, charge technologists and persons above the rank of department head and charge technologists, students in training, persons employed for not more than 24 hours per week and students employed during the school vacation period." (11 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2456-80-R:** Office and Professional Employees International Union, (Applicant) v. Kapuskasing District Roman Catholic Separate School Board, (Respondent).

Unit: "all office, clerical and technical employees of the respondent regularly employed for not more than 24 hours per week save and except persons covered by subsisting collective agreements." (4 employees in unit). (*Having regard to the agreement of the parties*).

**2459-80-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. National Grocers Co. Ltd., (Respondent).

Unit: "all office employees of the respondent at Ottawa, save and except assistant branch controller, persons above the rank of assistant branch controller, assistant produce manager, dispatchers, payroll supervisor, retail accounting supervisor, data receiving co-ordinator, order desk clerks, salesmen, buyers, confidential secretaries to the branch controller, distribution manager and branch manager, and persons covered by subsisting collective agreements to which Local 91 and the employer are parties." (64 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2466-80-R:** Retail, Wholesale, Bakery & Confectionery Workers' Union, (Applicant) v. General Bakeries Limited, (Respondent).

Unit: "all office clerical employees of the respondent in the Town of Orillia, save and except plant accountant, persons above the rank of plant accountant, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (16 employees in unit). (*Having regard to the agreement of the parties*).

**2467-80-R:** Ontario Nurses' Association, (Applicant) v. North Centennial Manor, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Kapuskasing, Ontario, save and except the Director of Nursing and persons above the rank of Director of Nursing." (5 employees in unit). (*Having regard to the agreement of the parties*).

**2479-80-R:** Hotel, Motel and Restaurant Employees and Beverage Dispensers Union, Local 757 Thunder Bay, Ontario, of the Hotel and Restaurant Employees and Bartenders' International Union, A.F.L. - C.L.C., (Applicant) v. Wiejak Crest Hotel Ltd., (Respondent).

Unit: "all employees of the respondent in Thunder Bay, Ontario, save and except the manager of the Lamplighter room, persons above that rank and persons covered by a subsisting collective agreement between the applicant and the respondent." (4 employees in unit).

**2480-80-R:** United Food and Commercial Workers International Union, A.F.L., C.I.O., (Applicant) v. Linnenbank Giftware & Souvenirs Limited (Respondents).



Unit: "all employees of the respondent located at 5720 Progress Street, Niagara Falls, Ontario, save and except foreladies and foremen, persons above the rank of forelady and foreman, office and sales staff and students employed during the school vacation period." (46 employees in unit). (*Having regard to the agreement of the parties*).

**2481-80-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Mason Windows Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Pickering, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (155 employees in unit).

**2499-80-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Varta Batteries Ltd., (Respondent).

Unit: "all employees of the respondent at St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, office, technical and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining." (40 employees in unit). (*Having regard to the agreement of the parties*).

**2500-80-R:** Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. L. E. Watson Building Supplies Co. Inc., (Respondent).

Unit: "all employees of the respondent at Maple, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2527-80-R:** United Steelworkers of America, (Applicant) v. Canadian Business Machines Limited Sherall Steel Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (47 employees in unit).

**2528-80-R:** Service Employees Union, Local 478 A.F.L., C.I.O., C.L.C., (Applicant) v. Parry Sound District General Hospital, (Respondent).

Unit: "all paramedical employees of the respondent at Parry Sound District General Hospital, save and except graduate pharmacists, supervisors, persons above the rank of supervisor, chief laboratory technologists, chief radiology technician, students employed under a co-operative training program and persons covered by existing collective agreements." (15 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2548-80-R:** Christian Labour Association of Canada, (Applicant) v. Shanty Bay Nursing & Rest Home Ltd. c/o/b/ as Kempfenfeldt Manor Nursing Home, (Respondent).

Unit: "all employees of the respondent in Barrie, Ontario, save and except the administrator, office manager, director of nursing, office administrator, supervisors and persons above the rank of supervisor and office staff." (47 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2555-80-R:** Canadian Brotherhood of Railway Transport and General Workers, (Applicant), v. Sonic Transport Systems Limited, (Respondent).

Unit: "all employees of the respondent working at or out of the City of Mississauga, Ontario, save and

except supervisors, persons above the rank of supervisor, dispatchers, office and sales staff, and dependent contractors.” (11 employees in unit). (*Having regard to the agreement of the parties*).

**2565-80-R:** United Steelworkers of America, (Applicant) v. City Parking, a Division of Citicom Inc., (Respondent).

Unit #1: “all employees of the respondent at Sudbury, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (10 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at Sudbury, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except foremen, persons above the rank of foreman, office and sales staff.” (7 employees in unit).

**2576-80-R:** Ontario Public Service Employees Union, (Applicant) v. Cairnlee Village owned and operated by Cairnlee Community, (Respondent).

Unit: “all employees of the respondent in the Township of Eastnor, save and except administrators, persons above the rank of administrator, office staff and students employed during the school vacation period.” (11 employees in unit). (*Having regard to the agreement of the parties*).

**2583-80-R:** Canadian Union of Public Employees, (Applicant) v. Hospital General de Hawkesbury and District General Hospital Inc., (Respondent).

Unit #1: “all lay office and clerical employees regularly employed by the respondent at Hawkesbury, Ontario, save and except the secretary of the executive director, the secretary of the director of finance and personnel, the secretary of the director of nursing, supervisors and persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (21 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Application for Certification Dismissed - No Vote Conducted*).

**2584-80-R:** The Canadian Union of Public Employees, (Applicant) v. The Essex County Board of Education, (Respondent).

Unit: “all employees of the respondent save and except persons covered by subsisting collective agreements.” (4 employees in unit).

**2590-80-R:** Labourers’ International Union of North America - Local 183, (Applicant) v. Westok Holdings, (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry of the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

**2618-80-R:** United Cement, Lime and Gypsum Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Plastics CMP Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Peterborough, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, licensed electricians, and those covered by an existing collective agreement between Barry J. Lawrence Limited and the applicant herein.” (21 employees in unit). (*Having regard to the agreement of the parties*).

**2631-80-R:** Energy and Chemical Workers Union, (Applicant) v. Dow Chemical of Canada, Limited, (Respondent) v. Oil, Chemical and Atomic Workers International Union, Local 9 - 672, (Intervener).

Unit: "all employees in the capital revamp group of the respondent at its Sarnia division, save and except sub-foremen, persons above the rank of sub-foreman, plant protection men, warehouse personnel, technical personnel, office staff and those persons covered under a Collective Agreement with Oil, Chemical and Atomic Workers' International Union, Local No. 9 - 672." (59 employees in unit). (*Having regard to the agreement of the parties*).

**2638-80-R:** Teamsters Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. National Grocers Co. Ltd., (Respondent).

Unit: "all employees of the respondent at its cash and carry depot in Kingston, Ontario, save and except assistant manager, persons above the rank of assistant manager, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in unit). (*Having regard to the agreement of the parties*).

**2646-80-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1190, (Applicant) v. Onisto Carpentry Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**2647-80-R:** Ontario Public Service Employees Union, (Applicant) v. Casatta, Ltd. carrying on business under the registered name of Kitchener Observation & Detention Centre, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Waterloo, Ontario, save and except Associate Director, Director, Secretary and persons regularly employed for not more than 24 hours per week." (9 employees in unit). (*Having regard to the agreement of the parties*).

**2657-80-R:** Christian Labour Association of Canada, (Applicant) v. Park Lane Nursing Home Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Paris, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (27 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Paris, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff." (5 employees in unit). (*Having regard to the agreement of the parties*).

**2667-80-R:** Ontario Public Service Employees Union, (Applicant) v. John McKechnie, McKechnie Ambulance Service, (Respondent).

Unit: "all employees of the respondent at Collingwood, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

**2685-80-R:** United Steelworkers of America, (Applicant) v. Consolidated Maintenance Services Limited, (Respondent).

Unit: "all employees of the respondent employed on the premises of the Provincial Building, 199 Larch



Street, Sudbury, save and except foreperson, persons above the rank of foreperson, office and sales staff.” (18 employees in unit). (*Having regard to the agreement of the parties*).

**2701-80-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, & Helpers, Local Lodge #128, (Applicant) v. Procor Limited, (Respondent).

Unit: “all employees of the respondent, save and except Foremen and those above the rank of Foreman, Timekeepers, Engineers, Office and Clerical Staff.” (6 employees in unit).

**2702-80-R:** Office and Professional Employees International Union, (Applicant) v. St. Catharines Civic Employees Credit Union Limited, (Respondent).

Unit: “all office, technical and clerical employees of the respondent at St. Catharines, Ontario, save and except assistant to the manager executive secretary, and persons above the rank of assistant to the manager executive secretary, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (7 employees in unit). (*Having regard to the agreement of the parties*).

**2706-80-R:** Teamsters Local 1351, Chemical Energy and Allied Workers, chartered by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. G & G Packaging Limited, (Respondent).

Unit: “all employees of the Respondent in the Municipality of Metropolitan Toronto, save and except foremen and foreladies, persons above the rank of foreman and forelady, office staff, plant guards, watchman and persons covered by a subsisting collective agreement between the respondent and the applicant.” (7 employees in unit).

**2746-80-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Advice Contracting Limited, (Respondent).

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Regional Municipality of Niagara and the County of Haldimand, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

## Applications Certified Subsequent to a Pre-Hearing Vote

**0088-79-R:** Ontario Utility Foremen’s Association, (Applicant) v. The Hydro Electric Commission of The Borough of Etobicoke, (Respondent).

Unit: “all foremen in the employ of the Respondent at and out of all its Commission Work Centres in the Borough of Etobicoke, in the Municipality of Metropolitan Toronto, save and except the accounting and billing foreman, caretaker, office staff and persons covered by subsisting collective agreements.” (13 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters’ list	
Number of persons who case ballots	13
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	3
Ballots segregated and not counted	1

**2026-80-R:** Christian Labour Association of Canada, (Applicant/Complainant) v. Artistic Building Maintenance and Supply Co. Ltd., a Division of 405-587 Ontario, Limited, (Respondent).

Unit: "all employees of the employer engaged in janitorial and building maintenance in the County of Kent, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff." (79 employees in unit). (*Having regard for the agreement of the parties*).

Number of names of persons on revised voters' list	53
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	8
Number of segregated ballots cast by persons whose name appear on voters' list	5
Number of segregated ballots cast by persons whose name do not appear on voters' list	3

**2387-80-R:** Ontario Public Service Employees Union, (Applicant) v. Religious Hospitallers of St. Joseph of the Hotel Dieu of Kingston, (Respondent).

Unit: "all (lay) employees of the respondent in Kingston, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate pharmacists, graduate dietitians, student dietitians, office and clerical staff, technical personnel, paramedical personnel, supervisors, foremen, persons above the rank of supervisor and foreman, chief engineers, students who are in training as part of an academic programme, persons covered by subsisting collective agreements and persons represented by the Ontario Nurses' Association by virtue of Board certificates dated August 19, 1980 and October 16, 1980, (Board File #0967-80-R). (38 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list	94
Number of persons who cast ballots	44
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	9

**2407-80-R:** Graphic Arts International Union, Local 28-B, (Applicant) v. Lawson Graphics, a division of Lawson Paper Converters Limited, (Respondent) v. Pringint Specialties & Paper Products Union, Local 466, (Intervener).

Unit: "all regular employees of the respondent in Metropolitan Toronto, save and except foremen or foreladies, persons above the rank of foreman and forelady, office and sales staff, security guards, students employed during the school vacation period, and employees covered under a subsisting collective agreement with the Graphic Arts International Union." (58 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	57
Number of persons who cast ballots	54
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	51
Number of ballots marked in favour of intervener	2

### **Application Certified Subsequent to a Post-Hearing Vote**

**1568-80-R:** United Steelworkers of America, (Applicant) v. Homeware Industries Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Tottenham, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (100 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		135
Number of persons who cast ballots	110	
Number of ballots marked in favour of applicant		84
Number of ballots marked against applicant		25
Ballots segregated and not counted		1

**1821-80-R:** Canadian Union of Public Employees, (Applicant) v. Participation House (Brantford, Ontario), (Respondent).

Unit: "all employees of the respondent in Brantford, Ontario save and except professional medical staff, registered nurses, graduate nurses, office and clerical staff, supervisor, and persons above the rank of supervisor." (30 employees in unit).

Number of names of persons on list as originally prepared by employer		30
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		12
Number of ballots marked against applicant		9

**2113-80-R:** Service Employees Union, Local 478, A.F.L., C.I.O., C.L.C., (Applicant) v. Parry Sound District General Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all office and clerical employees of the respondent in Parry Sound, Ontario, save and except secretary to the administrator, secretary to the assistant administrator, secretary to the director of nursing, secretary to the director of personnel, the administration office clerk, department heads and persons above the rank of department head, persons regularly employed for not more than twenty-four (24) hours per week, and persons covered by subsisting collective agreements." (23 employees in unit).

Unit #2: (*See Certification Dismissed - Post Vote*).

**FULL TIME** (Unit #1):

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		12
Number of ballots marked against applicant		9

**2453-80-R:** Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Smith-Corona, Division of SCM (Canada) Limited, (Respondent) v. Group of Employees (Objectors).

Unit: "all service, parts and warehouse employees of the respondent, Smith-Corona, Division of SCM (Canada) Limited, employed at 29 Gervais Drive, Don Mills, City of North York, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit).

Number of persons on voters' list at start of vote		14
Number of person who cast ballots	14	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		6



## APPLICATION FOR CERTIFICATION DISMISSED

### No Vote Conducted

**2410-79-R:** United Food and Commercial Workers International Union, A.F.L.-C.I.O.-C.L.C., (Applicant) v. Bright Veal Meat Packers Ltd., Globe Wholesale Meats Inc., (Respondent).

Unit: "all employees of the respondents in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (19 employees in unit).

**0757-80-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Frusino Structure Inc., (Respondent) v. Christian Labour Association of Canada, (Intervener).

**1032-80-R:** Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, affiliated with the AFL, CIO & CLC, (Applicant) v. Holiday Inn of Ottawa-Centre, of the Commonwealth Holiday Inns of Canada Limited, (Respondent).

**1166-80-R:** The Labourers' International Union of North America, Local No. 506, (Applicant) v. Community Nursing Homes Limited, (Respondent).

**2250-80-R:** International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Pietrangelo Masonry, (Respondent).

**2575-80-R:** United Steelworkers of America, (Applicant) v. Kolmar of Canada Limited, (Respondent) v. Group of Employees, (Objectors).

**2583-80-R:** Canadian Union of Public Employees, (Applicant) v. Hospital General de Hawkesbury and District General Hospital Inc., (Respondent).

Unit #1: (*See Bargaining Agents Certified - No Vote Conducted*).

Unit #: "all lay office and clerical employees of the respondent at Hawkesbury, Ontario, regularly employed for no more than twenty-four hours per week and students employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the secretary of the executive director, the secretary of the director of finance and personnel, the secretary of the director of nursing, supervisors and persons above the rank of supervisor." (2 employees in unit).

### Certification Dismissed Subsequent to a Pre-Hearing Vote

**1644-80-R:** United Brotherhood of Steeplejacks and Allied Trades of Canada, (Applicant) v. A. N. Shaw Restoration Ltd., (Respondent) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local Union No. 172 Restoration Steeplejacks, (Intervener).

Unit: "all employees in the flooring division of the respondent in the Province of Ontario save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff." (26 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	8
Number of segregated ballots cast by persons whose name appear on voters' list	2

**2321-80-R:** International Union of Operating Engineers, Local 796, (Applicant) v. Oxford Development Group Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except chief engineers, supervisors, building superintendents, persons above the rank of chief engineer, supervisor or building superintendent cleaners, security guards, office and clerical staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and persons covered by an subsisting collective agreement." (212 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	113
Number of persons who cast ballots	108
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	71

**2471-80-R:** United Food and Commercial Workers International Union A.F.L.-C.I.O.-C.L.C., (Applicant) v. Chocolate Products Co. Ltd., (Respondent).

Unit: "all employees of the respondent employed at Metropolitan Toronto, Ontario save and except supervisors, those above the rank of supervisor, sales, office and clerical staff, laboratory staff, those persons regularly employed for not more than 24 hours per week and students employed during the school vacation period. (119 employees in unit).

Number of names of persons on revised voters' list	123
Number of persons who cast ballots	122
Number of ballots marked in favour of applicant	56
Number of ballots marked against applicant	65
Ballots segregated and not counted	1

## Certification Dismissed Subsequent to a Post-Hearing Vote

**0970-80-R:** Service Employees Union, Local 204 affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant) v. Daheim Nursing Home Limited, (Respondent).

Unit: "all employees of Daheim Nursing Home in Uxbridge, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, and office staff." (22 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	22
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	14
Number of segregated ballots cast by persons whose name appear on voters' list	3

2113-80-R: Service Employees Union, Local 478, A.F.L., C.I.O., C.L.C., (Applicant) v. Parry Sound District General Hospital, (Respondent) v. Group of Employees, (Objector).

Unit #1: (*See Application Certified - Post Hearing Vote*)

Unit #2: "all office and clerical employees of the respondent in Parry Sound, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except secretary to the administrator, secretary to the assistant administrator, secretary to the director of nursing, secretary to the director of personnel, the administration office clerk, department heads, persons above the rank of department head, and persons covered by subsisting collective agreements." (4 employees in unit).

*PART TIME* (Unit #2)

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		3

2310-80-R: Canadian Union of Public Employees, (Applicant) v. Great Lakes Power Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical, and technical employees of the respondent in the City of Sault Ste. Marie and the District of Algoma, save and except supervisors, persons above the rank of supervisor; secretaries to the President, Vice-President - Operators, Vice-President - Finance, and Manager of Operations; professional engineers; persons regularly employed for not more than 24 hours per week; students employed during the school vacation period and persons covered by the subsisting collective agreement between the respondent and C.U.P.E. Local 3033." (15 employees in unit). (*Having regard to the agreement of the parties*).

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

2138-80-R: Canadian Union of Public Employees, (Applicant) v. Community Nursing Homes Limited, (Respondent) v. Employee, (Objector).

2307-80-R Labourers' International Union of North America - Local 183, (Applicant) v. Lorini Construction and/or Rinlor Const. Ltd., Rinaldo Lorini Drain and Concrete Limited and/or Lorini Concrete and Septic Tank Ltd., (Respondents).

2334-80-R: Labourers' International Union of North America, Local 183, (Applicant) v. Deacon Hill Inc., and/or Pine Valley II Inc., Birthmeadow Properties Limited, Outlook Investment and Development, (Respondents).

2397-80-R: International Union of Operating Engineers, Local 793, (Applicant) v. Stewart & Hinan Contractors Limited, (Respondent).

2498-80-R: International Association of Bridge, Structural & Ornamental Iron Workers, Local No. 700 and The Ironworkers District Council of Ontario, (Applicant) v. Commercial Contracting Corporation of Canada Ltd., (Respondent).

2519-80-R: International Brotherhood of Boilermakers, Iron ship Builders, Blacksmiths, Forgers and Helpers, Lodge #128, (Applicant) v. C.H.T. Steel, (Respondent) v. United Steelworkers of America, (Intervener).

2564-80-R: Energy and Chemical Workers Union, (Applicant) v. Dow Chemical of Canada, Limited, (Respondent).



**2603-80-R:** Hotel, Motel and Restaurant Employees and Beverage Dispensers' Union Local 757, Thunder Bay, of the Hotel and Restaurant Employees and Bartenders' International Union, A.F.L. - C.I.O., (Applicant) v. Hodder Avenue Hotel, (Respondent).

**2605-80-R:** Hotel and Restaurant Employees Union, Local 743, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO-CLC, (Applicant) v. Continental Motor Inn, (Respondent).

**2606-80-R:** Hotel and Restaurant Employees Union, Local 743, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO-CLC, (Applicant) v. Continental Motor Inn, (Respondent).

**2613-80-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Paul Krohnert Manufacturing Ltd., (Respondent).

**2617-80-R:** United Steelworkers of America, (Applicant) v. Novi Canadian Limited, (Respondent).

**2633-80-R:** Canadian Union of Public Employees, (Applicant) v. Kenora Public Library, (Respondent).

**2648-80-R:** Ontario Public Service Employees Union, (Applicant) v. London and District Association for The Mentally Retarded, (Respondent).

**2676-80-R:** Local Union 636 of the International Brotherhood of Electrical Workers (AFL-CIO-CLC), (Applicant) v. Maidstone Township, (Respondent).

**2686-80-R:** United Steelworkers of America, (Applicant) v. Leumas Truck Repair Ltd., (Respondent).

## **APPLICATION UNDER SECTION 1(4)**

**1500-80-R:** United Food and Commercial Workers International Union, Local Unions 175 and 633, (Applicant) v. The Great Atlantic & Pacific Company of Canada Limited, A & P Drug Mart Limited, (Respondents). (*Granted*).

## **APPLICATION UNDER SECTION 4 - SUCCESSOR RIGHTS (CROWN TRANSFERS ACT)**

**0823-80-R:** Canadian Union of Public Employees and its Local 6, (Applicant) v. The Corporation of The Regional Municipality of Sudbury, (Respondent) v. Ontario Public Service Employees Union, (Intervener). (*Granted*).

## **APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS**

**1997-80-R:** David L. Resnick, (Applicant) v. Retail, Commercial & Industrial Union, Local 206, (Respondent) v. Tip Top Tailors, (Intervener). (7 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

**1998-80-R:** Ralph Thompson, (Applicant) v. International Brotherhood of Electrical Workers, Local Union 636, (Respondent) v. Caledon Hydro Electric Commission, (Intervener). (3 employees in unit). (*Dismissed*)

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		2

**2102-80-R:** Peter Beyfuss, (Applicant) v. Retail, Commercial & Industrial Union, Local 206, Chartered by United Food & Commercial Workers International Union, (Respondent) v. Tip Top Tailors, (Intervener). (1 employee in unit). (*Granted*).

**2175-80-R:** Laura F. Cochlin, (Applicant) v. United Cement Lime & Gypsum Workers International Union, (Respondent) v. Lesmith Limited, (Intervener). (16 employees in unit).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of respondent		3
Number of ballots marked against respondent		10

**2388-80-R:** Colleen Berak, (Applicant) v. Hotel & Restaurant Employees & Bartenders International Union, Local 756, (Respondent). (*Dismissed*).

**2442-80-R:** Sonia Davis, Francoise Etienne, (Applicants) v. Christian Labour Association of Canada, (Respondent) v. Bestview Health Care Centre, (Employer). (Unit). (*Dismissed*).

**2468-80-R:** Margaret Vangesen, (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Respondent) v. Stewart-Warner Corporation of Canada, Limited, (Intervener). (*Granted*).

**2567-80-R:** Charles Walker, Alice Walker, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. Peel Condominium Corporation No. 149, (Intervener). (*Granted*).

**2717-80-R:** Joan Russell, (Applicant) v. Teamsters, Local Union 879, (Respondent) v. Gillies-Guy, A Division of Ultramar Canada Inc., (Intervener). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

**2653-80-R:** District of Halton and Mississauga Ambulance Service Ltd., (Applicant) v. Hank Meyer, Local 207, Ontario Public Service Employees Union and Ontario Public Service Employees Union, (Respondents). (*Withdrawn*).

## APPLICATION UNDER SECTION 90 (CONSENT TO PROSECUTE)

**0169-79-U:** The Branch Affiliated of Base Borden Collegiate Institute, Borden Division of District 27 of the Ontario Secondary School Teachers' Federation, (Applicant) v. Canadian Forces Base Borden Board of Education, (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**0348-79-U:** Labourers' International Union of North America, Local 183, (Complainant) v. PHI

International Inc., Farlo Associates Ltd., and East River Construction Limited, (Respondent). (*Withdrawn*).

**2424-79-U:** Julian Peters, Eugene Miner, and Eileen Leggett, (Complainants) v. All-Way Transportation Services Limited, (Respondent). (*Granted*).

**0914-79-U:** Teamsters Local Union No. 647, Milk & Bread Drivers, Dairy Employees, Caterers and Allied Employees, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Silverwood Dairies, Division of Silverwood Industries Limited, (Respondent). (*Dismissed*).

**1091-80-U:** Gary S. Dosanjh, (Complainant) v. U.A.W. Local 124 Plant Committee, (Respondent) v. Titan Proform Co. Ltd., (Intervener). (*Dismissed*)

**1278-80-U:** Canadian Union of Public Employees, (Complainant) v. Corporation of the Town of Petrolia, (Respondent). (*Dismissed*).

**1329-80-U:** United Cement, Lime and Gypsum Workers International Union, (Complainant) v. Westroc Industries Limited, (Respondent). (*Dismissed*).

**1558-80-U:** Energy and Chemical Workers Union, Local 672, (Complainant) v. Dow Chemical of Canada, Limited, (Respondent). (*Withdrawn*).

**1667-80-U:** United Cement, Lime and Gypsum Workers International Union, (Complainant) v. Westroc Industries Limited, (Respondent). (*Dismissed*).

**1838-80-U:** David W. Ebare, (Complainant) v. The International Union, United Automobile Aerospace and Agricultural Implement Workers of America, Local 127, (Respondent). (*Terminated*).

**1886-80-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. St. Thomas Sanitary Collective Service Limited, (Respondent). (*Granted*).

**1899-80-U:** Bruce McWilliams, (Complainant) v. Fur, Leather, Shoe & Allied Workers' Union, Local 82 Affiliated with United Food and Commercial Workers International Union, AFL-CIO, (Respondent #1) v. Rajac Leather and Sportwear, (Respondent #2). (*Dismissed*).

**1907-80-U:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. K-Mart Canada Limited, (Respondent). (*Withdrawn*).

**1934-80-U:** Ontario Public Service Employees Union, (Complainant) v. Corporation of the Town of Midland, (Respondent). (*Withdrawn*).

**2015-80-U:** Canadian Union of Public Employees, (Complainant) v. Capreol Bus Services, (Respondent). (*Terminated*)

**2052-80-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. St. Thomas Sanitary Collection Service Limited, (Respondent). (*Granted*).

**2223-80-U:** Albert L'Ecuyer, (Complainant) v. Prescott & Russell Association for the Mentally Retarded, (Respondent). (*Withdrawn*).

**2239-80-U:** United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home, (Respondent). (*Withdrawn*).

**2331-80-U:** Service Employees' International Union, Local 183, A.F.L., C.I.O., C.L.C., (Complainant) v. Plainfield Children's Home, (Respondent). (*Granted*).



**2363-80-U:** Gordon H. Duffy, (Complainant) v. U.A.W. (Local 252), (Respondent) v. A.P. Parts Canada Limited, (Intervener). (*Dismissed*).

**2380-80-U:** Gary LeBreton, Leonard Moyle and Dwight Dragomatz, (Complainant) v. Pepsi-Cola Bottling Company of Canada, (Respondent). (*Withdrawn*).

**2392-80-U:** Fur, Leather Shoe & Allied Workers' Union, Local 82 Affiliated with the United Food & Commercial Workers International Union AFL-CIO, (Complainant) v. Peter Makos Furs Limited, (Respondent). (*Withdrawn*).

**2394-80-U:** Canadian Union of Public Employees and its Local 2177, (Complainant) v. Travelways School Transit Limited, (Respondent). (*Withdrawn*).

**2395-80-U:** Energy and Chemical Workers Union, (Complainant) v. Medallion Plastics Limited. (Respondent). (*Withdrawn*).

**2416-80-U:** Canadian Union of Public Employees, (Complainant) v. Saint Patricks Home of Ottawa, (Respondent). (*Withdrawn*).

**2422-80-U:** International Union of Allied Novelty and Production Workers, Local 905, (Complainant) v. Lesney Products of Canada Limited, (Respondent). (*Withdrawn*).

**2424-80-U:** International Union of Allied Novelty and Production Workers, Local 905, (Complainant) v. Lesney Products of Canada Limited, (Respondent). (*Withdrawn*).

**2430-80-U:** United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home, (Respondent). (*Withdrawn*).

**2431-80-U:** United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home, (Respondent). (*Withdrawn*).

**2432-80-U:** United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home, (Respondent). (*Withdrawn*).

**2433-80-U:** United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home, (Respondent). (*Withdrawn*).

**2434-80-U:** United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home, (Respondent). (*Withdrawn*).

**2439-80-U:** Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Complainant) v. Royal Canadian Yacht Club, (Respondent). (*Withdrawn*).

**2444-80-U:** Teamsters Local Union No. 90 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. V & T Trucking Ltd., (Respondent). (*Withdrawn*).

**2457-80-U:** Service Employees International Union, Local 183 A.F.L.-C.I.O.-C.L.C., (Complainant) v. Four Seasons Hotel, (Respondent). (*Withdrawn*).

**2473-80-U:** Upholsterers' International Union of North America, AFL-CIO-CLC and its Local Union 1-9, (Complainant) v. Kroehler Mfg. Co. Limited, (Respondent). (*Terminated*).

**2485-80-U:** United Food and Commercial Workers International Union, (Complainant) v. Inglebrook Nursing Home, (Respondent). (*Withdrawn*).

**2493-80-U:** Labourers' International Union of North America, Local 183, (Complainant) v. Laurkar Investments Ltd., Milbell Investments Ltd., Baytzeem Holdings Ltd., carrying on business as Arnel Management and Greenwin Property Management and Carol Walker, (Respondents). (*Withdrawn*).

**2523-80-U:** Chemical, Energy & Allied Workers Division, Local Union No. 2175, (Complainant) v. Canadian Racing Plate Co. Ltd., (Respondent). (*Withdrawn*).

**2530-80-U:** Shelagh M. Sharrard, (Complainant) v. The Hotel and Club Employees Union Local 299, (Respondent). (*Withdrawn*).

**2531-80-U:** George Spaxman, (Complainant) v. Local 787 Refregeneration Workers of Ontario, (Respondent). (*Withdrawn*).

**2536-80-U:** Ontario Public Service Employees Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondent). (*Granted*).

**2537-80-U:** Ontario Public Service Employees Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondent). (*Granted*).

**2542-80-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Maurice Lamoureux Limited, (Respondent). (*Withdrawn*).

**2547-80-U:** Canadian Union of Public Employees, (Complainant) v. Labelle Bus Lines (Respondent). (*Withdrawn*).

**2551-80-U:** Chaim Goodman, (Complainant) v. United Garment Workers of America, (Respondent). (*Withdrawn*).

**2552-80-U:** Jules Jackson, (Complainant) v. International Union United Automobile, Aerospace and Agricultural Implement Workers of America - Local 1524, (Respondent) v. Lear Siegler Industries Limited, General Seating Division, (Intervener). (*Dismissed*).

**2554-80-U:** The International Beverage Dispensers' & Bartenders' Union, Local 280, (Complainant) v. 459222 Ontario Limited, c.o.b. ad The Royal Oak Public House, (Respondent). (*Withdrawn*).

**2570-80-U:** Evelyn Williams, Sheila Jackson, (Complainants) v. The Hotel and Club Employees' Union, Local 299, Toronto of The Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.I.O.-C.L.C.), (Respondent). (*Withdrawn*).

**2572-80-U:** United Steelworkers of America, (Complainant) v. Square D Canada Electrical Equipment Inc./Equipment Elecrique Square D Canada Inc., (Respondent). (*Withdrawn*).

**2578-80-U:** Ontario Public Service Employees Union, (Complainant) v. 359765 Ontario Inc., carrying on business as Vic Tanny's Health and Fitness Clubs, (Respondent). (*Granted*).

**2585-80-U:** Barry Brett, (Complainant) v. Local 14245 United Steelworkers of America and Flextile Ltd., (Respondent). (*Withdrawn*).

**2586-80-U:** Christian Labour Association of Canada, (Applicant/Complainant) v. Artistic Building Maintenance and Supply Co. Ltd., a Division of 405-587 Ontario, Limited, (Respondent). (*Granted*).

**2591-80-U:** Canadian Union of Public Employees, (Complainant) v. City Home, (Respondent). (*Withdrawn*).

**2601-80-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Royal Hotel (Sault Ste. Marie) Ltd., (Respondent) v. Hotel and Restaurant Employees' and Bartenders International Union, Local 412, (Intervener). (*Withdrawn*).

**2602-80-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Windsor Park Hotel, (Respondent) v. Hotel and Restaurant Employees' and Bartenders' International Union Local 412, (Intervener). (*Withdrawn*).

**2608-80-U:** Wallace Davidson, (Complainant) v. James Obbard, (Respondent). (*Withdrawn*).

- 2521-80-U:** R. L. King, (Complainant), v. Local 787 Refrigeration Workers of Ontario, (Respondent). (*Withdrawn*).
- 2622-80-U:** United Steelworkers of America, (Complainant) v. Rivenwood Furniture Ltd., (Respondent). (*Withdrawn*).
- 2624-80-U:** Marcel Fortin, (Complainant) v. B. G. Cheeco (Bedard General Ontario), (Respondent). (*Withdrawn*).
- 2628-80-U:** Miss Nora Martin, (Complainant) v. Local 6753 of the United Steelworkers of America, (Respondent). (*Withdrawn*).
- 2636-80-U:** International Ladies' Garment Workers Union, (Complainant) v. Newport Sportswear Limited, (Respondent). (*Withdrawn*).
- 2641-80-U:** Canadian Food and Associated Services Union, (Complainant) v. Zum Rudy's Foods Limited, carrying on business as Rudy's Restaurants, (Respondent). (*Withdrawn*).
- 2642-80-U:** Canadian Food and Associated Services Union, (Complainant) v. Zum Rudy's Foods Limited carrying on business as Rudy's Restaurants, (Respondent). (*Withdrawn*).
- 2643-80-U:** Canadian Food and Associated Services Union, (Complainant) v. Zum Rudy's Foods Limited, carrying on business as Rudy's Restaurants, (Respondent). (*Withdrawn*).
- 2649-80-U:** International Beverage Dispensers' and Bartenders' Union, (Complainant) v. The New Gregory House Inc., (Respondent). (*Withdrawn*).
- 2650-80-U:** William Frederick Hubbs, (Complainant) v. John McGinn, Steward, Local 636 International Brotherhood Electrical Workers, (Respondent). (*Withdrawn*).
- 2659-80-U:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant) v. Idylwild Rest Home, (Respondent). (*Withdrawn*).
- 2660-80-U:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant) v. Idylwild Rest Home, (Respondent). (*Withdrawn*).
- 2661-80-U:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant) v. Idylwild Rest Home, (Respondent). (*Withdrawn*).
- 2662-80-U:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., (Complainant) v. Idylwild Rest Home, (Respondent). (*Withdrawn*).
- 2664-80-U:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant) v. Idylwild Rest Home, (Respondent). (*Withdrawn*).
- 2665-80-U:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant) v. Idylwild Rest Home, (Respondent). (*Withdrawn*).
- 2670-80-U:** Hotel & Restaurant Employees Union Local 442 (AFL-CIO-CLC), (Complainant) v. Niagara Tower & Plaza Ltd. c.o.b. as A La Crepe Bertonne Restaurant, (Respondent). (*Withdrawn*).
- 2674-80-U:** Food and Service Workers of Canada (formerly Canadian Food and Associated Services Union), (Complainant) v. Zum Rudy's Foods Limited carrying on business as Rudy's Restaurants, (Respondents). (*Withdrawn*).
- 2681-80-U:** Food and Service Workers of Canada, (formerly Canadian Food and Associated Services Union), (Complainant) v. Zum Rudy's Foods carrying on business as Rudy's Restaurants, (Respondents). (*Withdrawn*).



**2693-80-U:** Food and Service Workers of Canada, (formerly Canadian Food and Associated Services Union), (Complainant) v. Zum Rudy's Foods Limited, carrying on business as Rudy's Restaurants, (Respondent). (*Withdrawn*).

**2771-80-U:** Hotels, Clubs, Restaurants & Taverns Employees Union, Local 261, Ottawa, (Complainant) v. Ross Sansom, General Manager, and Talisman Motor Inn, (Respondent). (*Withdrawn*).

**2813-80-U:** Ontario Nurses' Association, (Complainant) v. Perth Great War Memorial Hospital, (Respondent). (*Withdrawn*).

## **APPLICATION FOR DECLARATION THAT STRIKE UNLAWFUL (CONSTRUCTION INDUSTRY)**

**2611-80-U:** Wycliffe Group Limited, (Applicant) v. Toronto-Central Ontario Building and Construction Trades Council; Dave Johnson; Carpenters District Council of Toronto and Vicinity; W. Thornton, T. Crocker, and W. Armstrong, (Respondents). (*Withdrawn*).

## **APPLICATIONS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT**

**2491-80-OH:** Robert Kleinsteuber, (Complainant) v. Richard Kostuk, (Respondent). (*Withdrawn*).

**2521-80-OH:** Angelo Savino, (Complainant) v. E. K. N. Specialties Inc., (Respondent). (*Withdrawn*).

## **APPLICATIONS UNDER SECTION 39 (RELIGIOUS EXEMPTION)**

**2196-80-M:** Richard L. J. Lizotte, (Applicant) v. Service Employees Union Local 210, affiliated with Service Employees International Union, AFL-CIO-CLC, (Respondent Trade Union). (*Granted*).

**2489-80-M:** C. B. van Harten, (Applicant) v. Energy and Chemical Workers Union, Local 593 (formerly O.C.A.W. Local 9-593), (Respondent Trade Union). (*Withdrawn*).

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**2247-80-M:** National Silicates Limited, (Applicant) v. The United Rubber, Cork, Linoleum and Plastic Workers of America and its Local Lodge No. 771, (Respondent). (*Granted*).

**2449-80-M:** Dominion Linen Supply Limited, (Applicant) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351, (Respondent). (*Granted*).

**2550-80-M:** Reasby Services Ltd., St. Catherines, (Applicant) v. Laundry, Dry Cleaning and Dye House Workers International Union, Local 351, (Respondent). (*Granted*).

**2582-80-M:** The Parisian Laundry Co. of Toronto Limited, (Applicant) v. Laundry, Dry Cleaning & Dye House Workers International Union, Local 351, (Respondent). (*Granted*).

**2619-80-M:** International Union, United Plant Guard Workers of America, Amalgamated Local 1962, (Applicant) v. Governing Council of the University of Toronto, (Respondent). (*Granted*).

**2651-80-M:** The Textile Rental Institute of Ontario by & on behalf of Booth Avenue Hospital Laundry Inc., Centennial Hospital Linen Services & London Hospital Linen Services, (Applicant) v. Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351, (Respondent). (*Granted*).

## APPLICATIONS UNDER SECTION 55

**0912-80-R:** Teamsters, Local Union No. 647, Milk & Bread Drivers, Dairy Employees, Caterers and Allied Employees, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Silverwood Dairies, Division of Silverwood Industries Ltd., (Respondent) v. Borden Dairy, Division of The Borden Company, Limited, (Intervener #1) v. Retail, Wholesale and Department Store Union Local 440, A.F.L., C.I.O., C.L.C., (Intervener #2). (*Granted*).

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	22
Number of ballots marked in favour of applicant	6
Number of ballots marked in favour of intervener #2	16

**1381-80-R:** United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Roy Brandon Construction Brandon General Contractors Limited and/or Roy Brandon Limited, (Respondents). (*Granted*).

**2051-80-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Dibuo Concrete and Drains Limited and Royal York Concrete & Drain Ltd. and Sagripanti Bros. Concrete and Drains Limited and Brittany Concrete & Drain Ltd., (Respondents). (*Withdrawn*).

**2098-80-R:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen, Local 4, (Applicants) v. E. & D. Masonry Contractors and Falls Masonry Contractor, (Respondents). (*Granted*).

**2520-80-R:** International Beverage Dispensers' and Bartenders' Union, Local 280, (Applicant) v. 350038 Ontario Limited, carrying on business as the Genosha Hotel, (Respondent). (*Granted*).

## APPLICATIONS UNDER THE COLLEGES COLLECTIVE BARGAINING ACT (SECTION 78)

**2338-80-M:** Margaret Antonides, Weike (Vicky) Heidinga, Judy A. Knoops, (Applicants) v. Ontario Public Service Employees Union, (Respondent Trade Union) v. Humber College of Applied Arts and Technology, (Respondent Employer). (*Granted*).

**2339-80-M:** Margaret Antonides, Weike (Vicky) Heidinga, Judy A. Knoops, (Applicants) v. Ontario Public Service Employees Union, (Respondent Trade Union) v. Humber College of Applied Arts and Technology, (Respondent Employer). (*Granted*).

**2340-80-M:** Margaret Antonides, Weike (Vicky) Heidinga, Judy A. Knoops, (Applicants) v. Ontario Public Service Employees Union, (Respondent Trade Union) v. Humber College of Applied Arts and Technology, (Respondent Employer). (*Granted*).

## **APPLICATIONS UNDER THE COLLEGES COLLECTIVE BARGAINING ACT (SECTION 82)**

**2704-80-U:** Sperry Vickers, a Division of Sperry Inc., (Applicant) v. District Lodge No. 717 of International Association of Machinists and Aerospace Workers and R. B. McMillian and Persons named in Schedule "A", (Respondents). (*Granted*).

**2725-80-U:** Ontario Hydro, (Applicant) v. Canadian Union of Public Employees - C.L.C., Ontario Hydro Employees' Union, Local 1000 G. Gonchar, G. D. Pierce, et al, (Respondents). (*Withdrawn*).

**2820-80-U:** Consumers Distributing Company Limited (Applicant) v. Frank Hamlyn and other employees listed on attached Schedule "A", (Respondents). (*Granted*).

## **APPLICATION FOR DETERMINATION UNDER SECTION 95(2)**

**2055-79-M:** Sudbury & District Health Unit, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Dismissed*).

## **APPLICATION UNDER SECTION 96**

**2652-80-M:** Federal White Cement Ltd., (Employer) v. United Cement, Lime & Gypsum Workers' International Union, Local Union 368, (Trade Union). (*Terminated*).

## **APPLICATIONS UNDER SECTION 112a**

**0287-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Dismissed*).

**0776-80-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Teperman and Sons Limited, (Respondent). (*Withdrawn*).

**0777-80-M:** Labourers' International Union of North America, Local 527, (Applicant) v. V. K. Mason Construction Limited, (Respondent). (*Withdrawn*).

**1178-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Dismissed*).

**1179-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Dismissed*).

**1180-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Granted*).

**1181-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Granted*).

**1183-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Granted*).

**1184-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Granted*).

**1185-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Granted*).



**1684-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Dismissed*).

**1685-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Dismissed*).

**1686-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Dismissed*).

**1687-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Sinclair Welding Limited, (Respondent). (*Granted*).

**1801-80-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669 and the Ontario Provincial Council of Carpenters, (Applicant) v. Kapuskasing Board of Education, (Respondent). (*Dismissed*).

**2153-80-M:** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Bellevista Construction & Masonry Ltd., (Respondent). (*Granted*).

**2197-80-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508, (Applicant) v. The Lumus Company Canada Limited, (Respondent). (*Dismissed*).

**2258-80-M:** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicants) v. E. & D. Masonry Contractors and Falls Masonry Contractor, (Respondents). (*Granted*).

**2351-80-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. The Austin Company Limited, (Respondent). (*Withdrawn*).

**2355-80-M:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. J. Felkai Construction Limited, (Respondent). (*Granted*).

**2370-80-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721, (Applicant) v. Lackie Bros. Ltd., (Respondent). (*Withdrawn*).

**2420-80-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Joe Arban Contractor Limited, (Respondent). (*Withdrawn*).

**2460-80-M:** The Millwright District Council of Ontario United Brotherhood of Carpenters and Joiners of America, (Applicant) v. H & R Mechanical Installation Ltd., (Respondent). (*Granted*).

**2486-80-M:** Labourers' International Union of North America, Local 183, (Applicant) v. The Metropolitan Toronto Road Builders' Association and Weldon McEachen Construction Ltd., (Respondents). (*Granted*).

**2488-80-M:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 113, 1741, 1963, 1304, 3237 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Albion Walls & Ceiling Systems Limited, (Respondents). (*Granted*).

**2497-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and Case Excavating & Grading Co., (Respondent). (*Withdrawn*).

**2538-80-M:** International Brotherhood of Electrical Workers Local Union 1788, (Applicant) v. Ontario Hydro, (Respondent). (*Withdrawn*).

**2540-80-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 2486, (Applicant) v. David's (Grovedale) Construction Ltd., (Respondent). (*Withdrawn*).

**2562-80-M:** Labourers' International Union of North America Local 183, (Applicant) v. Ray Peterson Construction Company Limited, (Respondent). (*Withdrawn*).

**2593-80-M:** United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Ivey Dreger Construction Co. Ltd., (Respondent). (*Withdrawn*).

**2615-80-M:** United Brotherhood of Carpenters & Joiners of America Local 18, (Applicant) v. O.P.E.C. Drywall, (Respondent). (*Granted*).

**2616-80-M:** United Brotherhood of Carpenters & Joiners of America Local 18, (Applicant) v. Providence Drywall Ltd., (Respondent). (*Granted*).

**2640-80-M:** Chatham Construction Workers Association, Local #53 affiliated with The Christian Labour Association of Canada, (Applicant) v. Mack Glass Limited, (Respondent). (*Withdrawn*).

**2644-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Donald A. Foley Limited, (Respondent). (*Granted*).

**2655-80-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Precision Erectors, (Respondent). (*Granted*).

**2675-80-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. Bre-Ex Limited, (Respondent). (*Withdrawn*).

**2689-80-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and its Local 46, (Applicant) v. The Pipe Line Contractors Association of Canada and Cliffside Pipelayers Limited, (Respondent). (*Withdrawn*).

**2697-80-M:** United Brotherhood of Carpenters and Joiners of America Local 18, (Applicant) v. Hauserman Ltd., (Respondent). (*Granted*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**1805-80-R:** Canadian Union of Public Employees, (Applicant) v. United Counties of Prescott-Russell, (Respondent) v. Group of Employees, (Objectors). (*Terminated*).

**1959-80-R:** Labourers' International Union of North America - Local 183, (Applicant) v. 435385 Ontario Ltd., (Respondent). (*Denied*).

**2089-80-R:** Brotherhood of Railway, Airline & Steamship Clerks Freight Handlers, Exoress & Stations Employees, (Applicant) v. Airtours Ltd., (Respondent). (*Denied*).

**2234-80-R:** Christian Labour Association of Canada, (Applicant) v. Frusino Structure Incorporated, (Respondent) v. Labourers' Local 183, (Intervener). (*Denied*).

**2411-80-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38, (Applicant) v. Canadian Stebbins Engineering and Manufacturing Co., (Respondent). (*Withdrawn*).

**2432-80-R:** Homida Ali, (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Respondent) v. Ontario Hospital Association (Blue Cross), (Intervener). (*Dismissed*).





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